Supreme Court, U.S.
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No. 09-____

IN THE

Supreme Court of the United States

ZURICH AMERICAN INSURANCE CO., *et al.*,
Petitioners,

v.

PIONEER NATURAL RESOURCES USA, INC. AND
PIONEER NATURAL RESOURCES COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a case removed under the Convention on the Recognition and Enforcement of Arbitral Awards, 9 U.S.C. § 205, whether an order denying a motion to compel arbitration and remanding to state court is appealable under the Federal Arbitration Act's express right of interlocutory appeal from such denials, 9 U.S.C. § 16(a)(1)(C), notwithstanding 28 U.S.C. § 1447(d).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners, who were appellants below, are Syndicate 457 (a Lloyd's underwriting syndicate); Syndicate 33 (a Lloyd's underwriting syndicate); Syndicate 2020 (a Lloyd's underwriting syndicate); Syndicate 1225 (a Lloyd's underwriting syndicate); Syndicate 5000 (a Lloyd's underwriting syndicate); Syndicate 1036 (a Lloyd's underwriting syndicate); Syndicate 1209 (a Lloyd's underwriting syndicate); Syndicate 510 (a Lloyd's underwriting syndicate); Syndicate 2987 (a Lloyd's underwriting syndicate); Navigators Insurance Company; Aspen Insurance UK Limited; Houston Casualty Company; Commonwealth Insurance Company; Gard Marine & Energy Ltd.; Zurich American Insurance Company; Mutual Marine Office, Inc. on behalf of N.Y. Marine & General Ins. Co.; Arch Insurance Company; Liberty Mutual Insurance Company; American Offshore Insurance Syndicate; XL Specialty Insurance Company (through XL Marine & Offshore Energy).

The Respondents, who were appellees below, are Pioneer Natural Resources USA, Inc. and Pioneer Natural Resources Company.

The parent company of Syndicate 457 (a Lloyd's underwriting syndicate) is Munich Re and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 33 (a Lloyd's underwriting syndicate) are Hiscox Dedicated Corporate Member Limited, and Hiscox Group, and no other publicly held company owns more than 10% of its stock.

The parent company of Syndicate 2020 (a Lloyd's underwriting syndicate) is Catlin Group Ltd., and no other publicly held entity owns more than 10% of its stock.

The parent companies of Syndicate 1225 (a Lloyd's underwriting syndicate) are AEGIS Insurance Services Inc and Associated Electric & Gas Insurance Services Ltd. (AEGIS), and no other publicly held company owns 10% or more of its stock.

The parent company of Syndicate 5000 (a Lloyd's underwriting syndicate) is The Travelers Company, Inc., and no other publicly held company owns 10% or more of its stock.

The parents company of Syndicate 1036 (a Lloyd's underwriting syndicate) are QBE Underwriting Limited and QBE Insurance Group, and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 1209 (a Lloyd's underwriting syndicate) are Dornach Limited (lead underwriter) and XL Market Group Limited and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 510 (a Lloyd's underwriting syndicate) are Kiln Group Limited, Tokio Marine Nichido Fire Insurance Co. Ltd., and Tokio Marine Holdings, Inc., and no other publicly held company owns 10% or more of its stock.

The parent companies of Syndicate 2987 (a Lloyd's underwriting syndicate) are Brit UW Ltd., Brit Underwriting Holdings Ltd., Brit Overseas Holdings S.a.r.l., Brit Group Holdings B.V., and Brit Insurance Holdings, N.V., and no other publicly held company owns 10% or more of its stock.

The parent company of Navigators Insurance Company is The Navigators Group, Inc., and no other publicly held company owns 10% or more of its stock.

The parent companies of Aspen Insurance UK Limited are Aspen (UK) Holdings Limited and Aspen Insurance Holdings Limited, and no other publicly held company owns 10% or more of its stock.

The parent companies of Houston Casualty Company are Illium Inc. and HCC Insurance Holdings, Inc., and no other publicly held company owns 10% or more of its stock.

The parent company of Commonwealth Insurance Company is Northbridge Financial Corporation, and no other publicly held company owns 10% or more of its stock.

The parent company of Gard Marine & Energy Ltd. is Gard P&I (Bermuda) Ltd., and no other publicly held company owns 10% or more of its stock.

The parent companies of Zurich American Insurance Company are Zurich Holding Company of America, Inc., Zurich Insurance Company Ltd., and Zurich Financial Services Ltd., and no other publicly held company owns 10% or more of its stock.

The parent company of both Mutual Marine Office, Inc. and New York Marine and General Insurance Company is NYMAGIC, INC., and no other publicly held company owns 10% or more of their stock.

The parent companies of Arch Insurance Company are Arch Insurance Group and Arch Capital Group Ltd., and no other publicly held company owns 10% or more of its stock.

The parent company of Liberty Mutual Insurance Company is Liberty Mutual Holding Company, Inc., and no other publicly held company owns 10% or more of its stock.

American Offshore Insurance Syndicate has no parent corporation and no publicly held company owns 10% or more of its stock.

The parent companies of XL Specialty Insurance Company are Intercargo Corporation and XL Capital, Ltd., and no other publicly held company owns 10% or more of its stock.

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ZURICH AMERICAN INSURANCE CO. *et al.*,

Petitioners,

v.

PIONEER NATURAL RESOURCES USA, INC. AND PIONEER NATURAL RESOURCES COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners Zurich American Insurance Co. *et al.* (collectively, the "Underwriters") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of Fifth Circuit, issued without an opinion, is reproduced at page 1a of the Appendix to this petition ("App."). The unpublished opinion of the District Court is reproduced at App. 24a.

JURISDICTION

The judgment of the Fifth Circuit was entered on December 17, 2009. App. 1a. That court denied a timely filed petition for rehearing en banc on

January 27, 2010. App. 39a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth at App. 41a.

INTRODUCTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") is an international treaty designed "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). To ensure that our nation meets these treaty obligations under a uniform body of federal law, and to protect the strong federal policy favoring arbitration, Congress provided a broad and absolute right of removal to federal court for any claim that "relates to" an arbitration agreement covered by the Convention, and an interlocutory right to appeal any order denying a motion to compel arbitration under the Convention. *See* 9 U.S.C. §§ 16(a)(1)(C), 205.

In this case, however, the lower courts thwarted Congress's scheme in a manner that conflicts with decisions of this Court and other circuits. The District Court held that the case was properly removed under the Convention, but subsequently denied the mandatory federal forum on the ground that state law purportedly nullified any right to arbitration. The Fifth Circuit then refused to recognize the clear statutory appeal right of that decision denying arbitration, simply because that decision was issued simultaneously with—rather

than before—a remand decision purportedly non-appealable under 28 U.S.C. § 1447(d).

As a dissenting judge has lamented, the Fifth Circuit precedent relied upon by Respondents, by allowing this result, creates a "Catch-22 problem [that] cries out for immediate remedy from the Supreme Court." *Dahiya* v. *Talmidge Int'l, Ltd.*, 371 F.3d 207, 214 n.3 (5th Cir. 2004) (DeMoss, J., dissenting). Since that time, the need for this Court's review has only increased. Recently, the Court held in *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896, 1900-01 (2009), that an order refusing arbitration based on the purported absence of an arbitration agreement is appealable as of right, regardless of the merits of that issue. And the Court held in *Osborn* v. *Haley*, 549 U.S. 225, 240-44 (2007), that any conflict between a specialized removal scheme and the general prohibition on appealing remand orders in 28 U.S.C. § 1447(d) is resolved in favor of the more specific statute establishing conclusive removal jurisdiction that federal courts cannot revise.

The Fifth Circuit's law conflicts with these decisions. And it further conflicts with the holdings of other circuits that recognize a right to appeal decisions rejecting arbitration, regardless of whether those appealable decisions implicate remand issues. The result has been a denial of both the mandatory federal forum for Convention arbitration issues, and the mandatory right to federal appellate review, relegating these critical federal issues to disuniform state court review. This Court's review is warranted given these conflicts and the national and international importance of ensuring a uniform body

of federal law that upholds the United States' treaty obligations under the Convention.

Alternatively, and at a minimum, the Court should remand this case to the Fifth Circuit for it to explain its reasoning. The Fifth Circuit was the first and only lower court that could opine on the question of appellate jurisdiction in this case, yet it failed to do so. This Court should at the very least require the Fifth Circuit to explain its decision to override important federal rights.

STATEMENT OF THE CASE

1. The Underlying Dispute.

Pioneer owned and operated offshore oil and gas platforms and other facilities in the Gulf of Mexico. In 2005, Hurricane Rita passed over one of Pioneer's platforms, causing it to collapse. This action arose out of disputes over insurance claims filed by Pioneer related to that platform. App. 3-4a.[1]

Pioneer asserted claims under an Energy Package Policy (the "Package Policy"). App. 4a. Each of the Underwriters provided coverage under that policy. App. 6a. Section One of the policy covers physical damage to the platform. App. 25a. Section Two covers control of the well, and other costs. App. 25a. Section Three provides excess liability coverage. App. 6a, 25a. The Underwriters include citizens or subjects of one or more foreign nations. App. 16a.

Section Three's excess coverage is above the limits of an existing policy (the "AEGIS Policy") issued to Pioneer by Associated Electric & Gas Insurance

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[1] Citations to portions of the district court record not included in the Appendix are cited by the district court docket number, (*e.g.*, "Dkt. 1").

Services Ltd. App. 6a. Rather than existing as stand-alone coverage, Section Three's excess coverage "follow[s] the terms and conditions" of the underlying AEGIS Policy. App. 7a. The AEGIS Policy, in turn, provides that any controversy or dispute arising out of or relating to the policy "shall be settled by binding arbitration" subject to specified procedures, and that these "shall be the sole and exclusive procedures for the resolution of any such controversy or dispute." App. 33a; Dkt. 1, Ex. D, at 14.

Section Three of the Package Policy contains various specific exceptions to provisions of the AEGIS Policy, but none of those exceptions alters the incorporated mandatory arbitration provision. Dkt. 1, Ex. C, at 67. Nor would it have made sense for Section Three to have eliminated the arbitration requirement, since that section provided only excess coverage under the same terms as the AEGIS Policy, and the AEGIS Policy requires (and is currently undergoing) arbitration to resolve any disputes. App. 7a.[2]

2. Removal Under The Convention.

The United States is a signatory to the Convention (also called the New York Convention), which covers all commercial arbitration agreements except those that are both (1) entirely between citizens of the United States and (2) do not involve foreign property,

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[2] Separate from this provision, the General Insuring Conditions of the Package Policy also contained a permissive arbitration provision "[i]n the event it is mutually agreed by [Pioneer] and the Underwriters to arbitrate any dispute under this Policy." App. 31a. Nothing in this general provision, however, purports to alter the mandatory arbitration provision incorporated into Section Three.

envisage performance or enforcement abroad, or have some other reasonable relation with a foreign country. 9 U.S.C. § 202.

To carry out the United States' international obligations under the Convention and to ensure a uniform federal interpretation of it, Congress provided that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States," 9 U.S.C. § 203, and created original federal jurisdiction over all such actions or proceedings, without regard to the amount in controversy. *Id.* In addition, in 9 U.S.C. § 205 ("Section 205"), Congress broadly provided defendants with an absolute right of removal to federal court—exercisable at any time before trial—whenever "the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205.

Thus, to be removable under Section 205, a case need only "relate to" an arbitration agreement falling under the Convention, which includes commercial agreements involving at least one non-U.S. party that provide for arbitration in a signatory nation. *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat. Oil Co.*, 767 F.2d 1140, 1144 (5th Cir. 1985). If these minimal conditions are satisfied, Section 205 provides an absolute right of removal to federal court.

3. Proceedings In The District Court.

On August 8, 2007, Pioneer filed suit against the Underwriters under the Package Policy in Louisiana state court, claiming damages of over $50 million. App. 25a. On February 8, 2008, Pioneer filed an

amended petition in state court that specifically sought recovery under Section Three's excess coverage. App. 26a.[3]

Because this case "relates to" an arbitration agreement covered by the Convention, the Underwriters removed the case to the Middle District of Louisiana on April 18, 2008, pursuant to the plain terms of Section 205. Dkt. 1. The Underwriters then filed a motion to stay the litigation pending arbitration. Dkt. 3. Pioneer filed a competing motion to remand the case to state court. Dkt. 5. The District Court referred the motions to the magistrate judge to make an initial report and recommendation.

The parties did not dispute that the underlying AEGIS Policy incorporated into Section Three provides for mandatory arbitration. Nor did Pioneer credibly argue that the dispute in no way "relates to" a commercial arbitration agreement covered by the Convention. Indeed, Pioneer and AEGIS were then, and are now, engaging in mandatory arbitration in the U.S. of disputes under the AEGIS Policy, relating to many of the same coverage issues that are the subject of this case involving the excess insurers. App. 7a. Instead, Pioneer moved for remand asserting that, as a matter of contract interpretation, the "following form" provision in Section Three did not incorporate the AEGIS Policy's mandatory arbitration provision into the Package Policy, and therefore that its dispute with the Underwriters was not subject to mandatory arbitration. Dkt. 5.

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[3] Recently, Pioneer has made a demand for $188,100,000. *See* Offer of Judgment, *Pioneer Nat. Resources USA, Inc.* v. *Zurich Am. Ins. Co., et al.*, No. 558,017 (La. Dist. Ct., filed Apr. 22, 2010).

On January 6, 2009, the magistrate judge issued a Report and Recommendations rejecting Pioneer's contentions that there was no removal jurisdiction under Section 205. App. 3a. She recommended denial of Pioneer's motion to remand, expressly finding that "*the litigation relates to an arbitration agreement that falls under [the Convention], and therefore the matter was properly removed pursuant to 9 U.S.C. § 205.*" *Id.* at 19a (emphasis added).

The magistrate judge emphasized that Section 205 removal jurisdiction is determined from the petition for removal itself, and that *Beiser* v. *Weyler*, 284 F.3d 665, 672 n.7 (5th Cir. 2002), required the court to keep[] the jurisdictional and merits inquiries separate." App. 10a. Moreover, she noted "the importance of a [party's] right to appeal a decision on a motion to stay or compel arbitration" App. 11a. "Conscious of these issues," the magistrate judge was "cautious not to delve into the merits and focuse[d] on whether the allegations made in the amended petition or notice of removal are sufficient to establish jurisdiction." *Id.*

Applying these principles to the parties' pending motions, the magistrate judge found that questions involving whether the parties will eventually be compelled to arbitration based on the interpretation the policies were "inapplicable" to the motion to remand. *Id.* Pioneer's arguments about the intent of the parties to incorporate that provision into the Package Policy were "not the issue before the Court on the motion to remand," App. 14a, but instead were "merits-based inquiries, separate from the Court's determination of whether it has jurisdiction to decide the case either way." *Id.*

The magistrate judge first found the Underwriters' allegations sufficient on their face to establish that the arbitration agreement incorporated under Section 3 of the Package Policy falls under the Convention under 9 U.S.C. § 202, because it involved non-U.S. parties and provided for arbitration in a convention signatory. App. 16a. Accordingly, the judge found that removal was proper because the claims for coverage under Section Three "relate to" a Convention arbitration agreement under the "extremely loose" requirements of 9 U.S.C. § 205—regardless of whether such claims would eventually be stayed or compelled to arbitration following a determination of the merits of Pioneer's contractual arguments. App. 17a. The judge also determined that supplemental jurisdiction existed over Pioneer's claims for coverage under Section Two of the Package Policy, regardless of whether those claims might also support removal on their own *Id.*

Over Pioneer's objections, the District Court approved the magistrate judge's Report and Recommendations in its entirety on February 10, 2009, and "adopt[ed] it as the court's opinion herein." App. 22a. The court accordingly denied Pioneer's motion for remand, *id.*, adopting the magistrate judge's determination that "the litigation relates to an arbitration agreement that falls under [the Convention], and therefore the matter was properly removed pursuant to 9 U.S.C. § 205." App. 19a, 22a.

That determination by the District Court that this case satisfies every requirement of Section 205 should have been the end of the jurisdictional inquiry. The court, however, misunderstood its subsequent role. After the court determined that removal had been proper, the Underwriters filed a

motion to compel arbitration of all claims pursuant to 9 U.S.C. § 206 or, in the alternative, to stay litigation of some claims pending arbitration of the claims under Section Three of the Package Policy. Dkt. 74. Pioneer opposed, and filed a second motion to remand, this time seeking remand only of its claims for coverage under Section Two. Dkt. 81.

On October 7, 2009, the District Court simultaneously ruled on both the Underwriters' motion to compel arbitration, and Pioneer's motion for partial remand, holding that state law precluded the Underwriters' reliance on the mandatory arbitration provision. The court held that "the federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ordinary contract principles determine who is bound." App. 31a. (citations omitted). The court then parsed the insurance policies, concluding that the mandatory arbitration provision in the AEGIS Policy conflicted with the permissive arbitration provision in the general insuring conditions of the Package Policy. Under state law, the court held that the resulting ambiguity must be construed in favor of the insured, and that "no valid agreement exists between the parties to submit the disputes to arbitration." App. 36a.

Having concluded as a matter of contract interpretation that that "the Package Policy does not present a valid agreement to arbitrate," the court remanded the entire case, purportedly for lack of subject matter jurisdiction. In its view, "[b]ecause the Convention only applies to valid commercial arbitration agreements in international contracts the court also concludes that the Convention is not applicable to the dispute before the court and federal question

jurisdiction is, therefore, absent." App. 37a. Under governing Fifth Circuit law, this determination also resulted in a denial of the Underwriters' motion to compel arbitration or stay litigation, because "any order remanding [a matter to state court] for lack of subject matter jurisdiction necessarily denies all other pending motions." *Dahiya*, 371 F.3d at 210. *Accord Carlson* v. *Arrowhead Concrete Works, Inc.*, 445 F.3d 1046, 1052 (8th Cir. 2006).

4. Proceedings in the Court of Appeals.

On October 8, 2009, the Underwriters filed a timely notice of appeal to the Fifth Circuit from the District Court's order. Dkt. 101. Pioneer filed a motion to dismiss the appeal for lack of jurisdiction, relying principally on two Fifth Circuit cases for the view that after a district court denies arbitration under the Convention and remands a case to state court for lack of subject matter jurisdiction, 28 U.S.C. § 1447(d) ("Section 1447(d)") bars a federal appellate court from reviewing the arbitration ruling. Appellees' Mot. to Dismiss, at 3-8 (citing *Dahiya*, 371 F.3d 207, and *Certain Underwriters at Lloyd's, London* v. *Warrantech Corp.*, 461 F.3d 568 (5th Cir. 2006)).

The Underwriters opposed the motion, contending that appellate jurisdiction existed under 9 U.S.C. § 16(a)(1) ("Section 16(a)(1)"), which provides that "[a]n appeal may be taken from * * * an order * * * denying an application under section 206 of this title [*i.e.*, the Convention] to compel arbitration." 9 U.S.C. § 16(a)(1)(C). The Underwriters also explained that Section 1447(d) does not abrogate the express appeal right provided under Section 16(a)(1). Appellants' Opp. to Motion to Dismiss, at 8-9.

On December 17, 2009, the Fifth Circuit granted the motion to dismiss the appeal in a summary order. Even though this was the first opportunity for any court to rule on the question of appellate jurisdiction in this case, the Fifth Circuit granted the motion without any further briefing or argument, without any opinion, and without any explanation of its reasoning or citation of authority. App. 1a. On January 27, 2010, the Fifth Circuit denied the Underwriters' timely petition for rehearing en banc, again without any explanation or opinion. App. 39a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS.

A. Under This Court's Precedents, Section 16(a)(1) Confers A Mandatory Right To Appeal Decisions Denying Arbitration.

The language of 9 U.S.C. § 16(a)(1)(C) could not be more clearly applicable to this case: "[a]n appeal may be taken from * * * an order * * * denying an application under section 206 of this title to compel arbitration." The Underwriters filed an application to compel arbitration under 9 U.S.C. § 206, which pertains specifically to agreements governed by the Convention. *See* Dkt. 74. The District Court denied that request because, in the Court's view, the asserted arbitration agreement did not apply to the parties' dispute. Accordingly, Section 16(a)(1) unequivocally provides a right of immediate appellate review, regardless of the merits of the District Court's ruling.

1. This result is compelled not only by the plain terms of that statute, but also by the Court's recent

decision in *Arthur Andersen*, which established a "categorical, bright-line approach" to jurisdiction under Section 16(a)(1). *Conrad* v. *Phone Dirs. Co.*, 585 F.3d 1376, 1383 (10th Cir. 2009). There, the petitioners had moved for a stay of litigation pending arbitration. As in this case, the district court denied the request because, after examining the relevant agreements, it believed that the asserted arbitration agreement did not apply to the dispute. The party seeking arbitration appealed under Section 16(a)(1).[4] The court of appeals dismissed the appeal for want of jurisdiction, based on its view that there was no agreement by the parties to arbitrate.

This Court reversed, holding that under Section 16(a)(1)'s "clear and unambiguous" terms, "any litigant who asks for a stay [pending arbitration] is entitled to an immediate appeal from denial of that motion—regardless of whether the litigant is in fact eligible for a stay." *Arthur Andersen*, 129 S. Ct. at 1900. The court of appeals had jurisdiction simply because the petitioner had requested arbitration, regardless of whether that request was right or wrong. A court of appeals may not "look through" the pleadings to determine appealability under Section 16(a)(1). Rather, jurisdiction over the appeal is determined merely by "focusing upon the category of order appealed from." *Id.* (citation omitted). This straightforward determination is "immeasurably more simple and less factbound than the threshold determination * * * whether the litigant was a party

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[4] *Arthur Andersen* involved the appeal of an order denying a stay of litigation pending arbitration, which is appealable under Section 16(a)(1)(A). There is no relevant difference between Section 16(a)(1)(A) and Section 16(a)(1)(C), which covers orders denying motions to compel arbitration under the Convention.

to the contract." *Id.* at 1901. That latter question is reserved until "after the court has accepted jurisdiction over the case." *Id.*

Under *Arthur Andersen*, the Fifth Circuit should have looked only to the fact that the District Court had rejected the Underwriters' application to compel arbitration in order to conclude that it had appellate jurisdiction under Section 16(a)(1). Instead, the court engaged in a different inquiry. It dismissed the appeal based on Pioneer's invocation of Fifth Circuit precedent which, according to Pioneer, bars appellate jurisdiction under Section 1447(d) whenever an otherwise appealable denial of arbitration results in a remand. *See Dahiya*, 371 F.3d at 210 ("We lack jurisdiction under § 16 because the denials of Appellants' motions to stay and to compel arbitration accompanied a remand for lack of subject matter jurisdiction."). That was wrong. Under *Arthur Andersen*, the order denying arbitration was expressly appealable under Section 16(a)(1) notwithstanding the District Court's conclusion that the parties had not agreed to arbitrate. Whether the District Court was right or wrong about that issue is a question on the merits, not of jurisdiction.

2. The import of *Arthur Andersen* is not undermined by any purported conflict between the command of Section 16(a)(1) that "an appeal may be taken" from an order denying arbitration, and the language of Section 1447(d) providing that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." As the Court made clear in *Osborn* v. *Haley*, *supra*, any such conflict must be resolved in favor of a specialized removal scheme established by Congress, which in this case mandates a non-discre-

tionary federal forum for all claims that "relate to" arbitration agreements governed by the Convention.

In *Osborn*, the Court held that Section 1447(d) did not bar an appeal of a remand order issued in contravention of a specialized removal scheme. In the scheme at issue there (the Westfall Act), removal is authorized whenever the Attorney General certifies that a defendant federal employee was acting within the scope of official duties. In *Osborn*, the case had been removed upon such a certification, but the district court remanded on the ground that the certification had been improper. This Court held that it had jurisdiction to consider an appeal of that remand order, notwithstanding Section 1447(d).

The Court held that Congress gave district courts no authority to return cases to state courts on the ground that certification was unwarranted; the certification itself determines removal jurisdiction. 549 U.S. at 241-42. If a district court later concludes that the certification decision was incorrect, it may override that decision for purposes of trial, but that would not destroy federal jurisdiction. *Id.* at 242. Because the certification provides mandatory federal jurisdiction, appellate courts likewise have jurisdiction over any remand decision notwithstanding Section 1447(d). Because Congress's specialized removal scheme and the general language of Section 1447(d) were facially at odds, "only one can prevail." *Id.* at 244. The specialized scheme prevailed because it was "tailor-made" for the circumstances and provided a federal forum selection that was "beyond the ken of district courts to revise." *Id.*

The same is true with cases removed under the Convention. As even the Fifth Circuit has recognized, Section 205 is "one of the broadest

removal provisions * * * in the statute books." *Acosta* v. *Master Maint. & Constr., Inc.*, 452 F.3d 373, 377 (5th Cir. 2006). It provides specialized removal jurisdiction whenever "the subject matter of an action or proceeding pending in a State court *relates to* an arbitration agreement * * * falling under the Convention." 9 U.S.C. § 205. This very "low bar" for removal jurisdiction under Section 205 means that "whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement 'relates to' the plaintiff's suit." *Beiser*, 284 F.3d at 669. Thus, the district court "will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense," as long as the assertion is not "absurd or impossible." *Id.*

"So generous is the removal provision" that "the general rule of construing removal statutes strictly against removal 'cannot apply to Convention Act cases because in these instances, Congress created special removal rights to channel cases into federal court.'" *Acosta*, 452 F.3d at 377 (citation omitted). By providing for "easy removal" under Section 205, Congress intended for the district courts to make a quick and conclusive assessment of their jurisdiction on the pleadings alone. *Beiser*, 284 F.3d at 674, 670-71.[5] Once it is determined that a case "relates to" an

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[5] To accomplish this goal, Section 205 provides that "[t]he procedure for *removal* of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal." The *Dahiya* decision incorrectly jumped to the conclusion that this incorporates Section 1447(d)'s bar on appealing *remand* orders. *See* 371 F.3d

arbitration agreement covered by the Convention—as the District Court determined here, App. 19a, 22a, statutory removal jurisdiction exists. Once conferred, that jurisdiction cannot be ousted by any merits determination.

As in *Osborn*, Congress's specialized removal jurisdiction is conclusive whenever it is found that a case relates to an arbitration agreement, and the express bestowal of appellate jurisdiction over any decision denying that mandatory federal forum takes precedence over the more general language of Section 1447(d).[6] Like the certification in *Osborn*, a district court's determination that a case relates to an arbitration agreement under Section 205 is conclusive of the jurisdictional inquiry, and that statute calls for no further threshold inquiry. 549 U.S. at 243. Any later remand for lack of subject matter jurisdiction is unauthorized and therefore cannot oust appellate jurisdiction to review the basis for that order.

As explained by the dissenting judge in *Dahiya*—the chief precedent invoked by Pioneer—the Fifth Circuit's law precluding appellate review conflicts with that clear intent of Congress, and "cries out for immediate remedy from the Supreme Court." *Dahiya*, 371 F.3d at 214 n.3 (DeMoss, J., dissenting). In an ordinary case, removal merely changes the

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at 210. Removal is addressed under 28 U.S.C. § 1446, not Section 1447(d), which addresses remands.

[6] *Cf. Powerex Corp.* v. *Reliant Energy Servs.*, 551 U.S. 224, 240 (2007) (Breyer, J., dissenting) (*Osborn* recognizes that "even a statute silent on the subject [of remand] can create an important conflict with § 1447(d)'s 'no appellate review' instruction," which is resolved "by reading a later more specific statute as creating an implicit exception to § 1447(d)").

forum in which the same case will be tried. *Id.* The non-appealability of a remand order under Section 1447(d) is just "a reflection of the congressional policy to prevent delays of the trial on the merits by appeals over validity of the remand order." *Id.* But under Section 205, "the purpose is to allow the removing party to assert in federal court the existence of an agreement to arbitrate under the Convention and compel such arbitration in lieu of the trial that would otherwise occur in the state court." *Id.* Removal under Section 205 "raises the issue of whether there should be a trial on the merits at all; and the immediate appeals process authorized under 9 U.S.C. § 16 reflects the strong congressional policy of giving preference to arbitration over litigation as to agreements covered by the Convention." *Id.* *See also* H.R. Rep. 100-889, at 36-37 (1988).

Here, the District Court expressly determined that the case was properly removed under Section 205, adopting the magistrate judge's analysis of jurisdiction as its own opinion. App. 19a, 22a. Subsequently, the District Court by its own acknowledgement engaged in a merits inquiry, interpreting the contracts to determine whether a valid arbitration agreement existed. App. 36a. The District Court was not then authorized to issue a remand for lack of jurisdiction, because federal removal jurisdiction had been conclusively determined. Indeed, the court could not have interpreted the insurance agreements without jurisdiction to engage in that inquiry. As in *Osborn*, then, the court of appeals' jurisdiction could not be barred by Section 1447(d). Rather, the denial of the motion to compel based on the District Court's ruling

that no valid agreement to arbitrate existed was immediately appealable under Section 16(a)(1)(C).

Accordingly, the decision below conflicts with both *Arthur Andersen*'s interpretation of Section 16(a), and *Osborn*'s holding that a conflict with Section 1447(d) is resolved in favor of a comprehensive statute that conclusively determines federal jurisdiction. The Court should grant certiorari to rectify this departure from this Court's precedents.

B. The Decision Below Conflicts With The Decisions of Other Circuits.

The District Court initially determined that it had removal jurisdiction under the Convention. App. 22a. When it later concluded that there was no valid agreement to arbitrate, it should have simply denied the Underwriters' motion to compel arbitration, thereby allowing the Underwriters to immediately appeal that denial under Section 16(a)(1)(C). This is what would have happened in most circuits. But instead, the court denied the motion to compel arbitration by tacking on an unauthorized remand order, which the Fifth Circuit found to nullify appellate jurisdiction. The Fifth Circuit's decision conflicts with decisions of other circuits.

The Ninth Circuit has held that jurisdiction exists under Section 16(a)(1), notwithstanding Section 1447(d), to review an order denying enforcement of an arbitration agreement under the Convention and simultaneously remanding to state court. In *Reddam* v. *KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), the district court held that it had removal jurisdiction under the Convention, but later remanded when the arbitration panel's refusal to decide the case led the court to believe federal

jurisdiction was no longer present. *Id.* at 1059. Because the district court had already found that it had jurisdiction under the Convention, the Ninth Circuit held that the later occurring event did not destroy federal jurisdiction and that Section 1447(d) therefore did not preclude an appeal of the order. *Id.* But independent of that holding, the Ninth Circuit also expressly held that it had jurisdiction to review the denial of arbitration under Section 16(a)(1). *See id.* at 1059 n.8 ("Beyond that, we have jurisdiction under 9 U.S.C. § 16(a)(1)(A) & (B) to review the district court's conclusion that it could no longer enforce the arbitration agreement.").

There is thus a basic divergence among the lower courts. *Cf. Restoration Pres. Masonry* v. *Grove Europe*, 325 F.3d 54, 59 (1st Cir. 2003) (noting, but not resolving, circuit split). In the Fifth Circuit, unlike the Ninth, a determination of non-arbitrability in a case removed under the Convention is entirely unreviewable, because a finding that the parties did not agree to arbitrate a dispute divests the trial court of removal jurisdiction. *See Dahiya*, 371 F.3d 207; *Warrantech*, 461 F.3d 568. The Eighth and Fourth circuits have ruled the same way. *See Transit Cas. Co.* v. *Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997); *Severonickel* v. *Reymenants*, 115 F.3d 265, 267 (4th Cir. 1997).

By contrast, the Second Circuit has correctly held that a non-frivolous assertion that a claim "relates to" an arbitration agreement under the Convention confers federal jurisdiction that is not divested by a subsequent merits determination of arbitrability. In *Sarhank Group* v. *Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005), the court held that because

defendants' allegations of an arbitration agreement were "not immaterial, frivolous, or made solely to obtain jurisdiction," the district court had subject matter jurisdiction, and questions regarding the validity of the agreements were "merits questions," that did not involve a lack of subject matter jurisdiction, "although cases confusing these issues are frequently found in the reports." *Id.*

Similarly, in *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 100 (3d Cir. 2000), the district court denied a motion to compel arbitration, holding that it could not order arbitration without determining the validity of the underlying contract. *Id.* at 102. On appeal, the Third Circuit held that it had jurisdiction under Section 16(a)(1) to review the denial, notwithstanding the absence of a finding of a valid arbitration agreement. *Id.* at 100. As the court held, "[i]t is precisely this sort of appeal that the FAA's interlocutory appeal provisions were designed to address." *Id.* "Refusing [the] appeal could circumvent the FAA's clear purpose of enforcing binding arbitration agreements." *Id.* at 104.[7]

The Fifth Circuit's dismissals in this and similar cases, despite the clear language of Section 16(a)(1), have had precisely this effect of "circumvent[ing] the FAA's clear purpose of enforcing binding arbitration

[7] *See also Koveleskie* v. *SBC Capital Mkts. Inc.*, 167 F.3d 361, 363 (7th Cir. 1999) (holding that, despite the district court's declaration of a need for discovery before a decision could be reached on the arbitration issue, there was no doubt that the requested order was denied, and thus appealable); *McLaughlin Gormley King Co.* v. *Terminix Int'l Co., L.P.*, 105 F.3d 1192, 1193 (8th Cir. 1997) (reviewing a district court's refusal to order arbitration prior to discovery on issue of arbitrability because "an order that favors litigation over arbitration * * * is immediately appealable under § 16(a)").

agreements." *Id.* Ironically, it was the Fifth Circuit, in *Beiser* v. *Weyler*, *supra*, that most clearly explained the dangers of that approach, before that court's abrupt reverse of course in *Dahiya*, *supra*. As noted above, the court in *Beiser* adopted a "low bar" under which Section 205 removal jurisdiction exists in "just about any suit" in which a defendant invokes an arbitration clause, "[a]s long as the defendant's assertion is not completely absurd or impossible." *Beiser*, 284 F.3d at 669.

As the *Beiser* court explained—consistent with this Court's later holding in *Arthur Andersen*, 129 S. Ct. at 1400—the contrary view of "conflating jurisdiction and the merits" would "deprive defendants of an opportunity to appeal in a significant class of cases in which the district court concludes that the arbitration clause under the Convention does not in fact provide a defense." *Id.* at 672. "[D]enying defendants appellate review over the refusal to enforce an arbitration clause under the Convention would be in tension with the solicitude with which federal law generally treats arbitration" and would have "irrational consequences" by allowing state judges throughout the nation to have the final word on whether a dispute is arbitrable pursuant to an international treaty. *Id.* at 673-674.[8]

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[8] *See Restoration Pres. Masonry*, 325 F.3d at 59 (*Beiser* conflicted with Eighth Circuit by "criticizing conflation of jurisdictional and merits inquiries in remanding arbitration cases 'into a single step,' and arguing that the consequences of such a conflation are 'both irrational and inconsistent with * * * precedents' because of the importance of international comity, the goal of development of a uniform body of law regarding the Convention, the international business community's need for predictability, and the general federal policy of solicitude toward arbitration").

The Fifth Circuit, however, abruptly retreated from these principles in *Dahiya*, 371 F.3d at 211 & n.5, placing it in conflict with this Court's precedents and those of other circuits. As in this case, even where it is determined that removal jurisdiction exists under Section 205 because a claim "relates to" an arbitration agreement covered by the Convention, a district court's merits-based determination of non-arbitrability will divest both district court *and* appellate jurisdiction. These results are exactly the untenable ones recognized in *Beiser*—the absence of any uniform, federal body of law carrying out an international treaty and the nullification of the strong federal policy favoring arbitration.

This precedent also permits courts, and parties, to manipulate appellate jurisdiction, in contravention of this Court's settled law. *Whitmore* v. *Arkansas*, 495 U.S. 149, 155-56 (1990) ("[a] federal court is powerless to create its own jurisdiction"). For example, in *Palmer Ventures LLC* v. *Deutsche Bank AG*, 254 Fed. App'x 426 (5th Cir. 2007), the district court, much like the court in this case, initially denied a motion to remand a case removed under Section 205 "with the caveat that a closer look * * * might ultimately result in a remand for lack of subject matter jurisdiction." *Id.* at 428-29. The court then denied a motion to compel arbitration, finding no subject matter jurisdiction under the Convention. But instead of issuing an immediate remand, the court gave the party 20 days to assert another basis for federal jurisdiction. *Id.* at 429. Rather than do so, the defendant filed an immediate notice of appeal to the Fifth Circuit pursuant to Section 16(a)(1)(C). The Fifth Circuit took jurisdiction over the appeal and stayed further action in the trial court. *Id.*

In this case, however, the District Court remanded the case at the same time it rejected the Underwriters' motion to compel arbitration, and the Fifth Circuit held that this fortuitous timing precluded appellate jurisdiction. Had the court denied the motion to compel *before* issuing a remand, the Underwriters could have ensured appellate jurisdiction merely by immediately appealing the denial of the motion to compel under Section 16(a)(1)(C).

As evidenced by the decisions of other courts recognizing that determinations of non-arbitrability do not divest jurisdiction over cases removed under the Convention, there is no logical or jurisprudential rationale for allowing appeals of such decisions whenever they precede remand orders, but denying appeals of the same rulings when the District Court elects to issue a simultaneous remand. Congress expressly granted a right of appeal in Section 16(a)(1), in light of the important federal policies favoring arbitration under the Convention. The Fifth Circuit's denial of that right conflicts with the precedents of this Court and other circuits. The Court's review is warranted to resolve those conflicts, and ensure that the right to appeal a denial of arbitration is uniform and predictable for foreign parties seeking to enforce commercial arbitration agreements under the Convention in U.S. courts.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

This case also involves a question of national importance because the treaty obligation of the United States to provide predictable and uniform rights to enforce arbitration agreements under the Convention is thwarted when courts deny the appellate review granted by Section 16(a)(1) of the FAA.

In the FAA, Congress intended to reverse judicial enmity to arbitration. *See Gilmer* v. *Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). "Section 16(a) serves that end by ensuring that district court orders hostile to arbitration agreements can be immediately appealed." *Conrad*, 585 F.3d 1381. Congress could not have made the FAA's appeal right more plain: "[a]n appeal may be taken from an order * * * denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1)(C). This Court's review is needed to ensure that the lower courts fulfill this nation's treaty obligations under the Convention.

The Court has long recognized the strong federal policy favoring the effective and efficient resolution of disputes through private arbitration. *See Mitsubishi Motors Corp.* v. *Solar Chrysler-Plymouth, Inc.*, 476 U.S. 614, 626 (1985); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The Convention further implicates "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi*, 473 U.S. at 629. These requirements persist "even assuming that a contrary result would be forthcoming in a domestic context." *Id.* By enabling the Convention's treaty obligations in Chapter 2 of the FAA, Congress made the Convention the "highest law of the land." *Sedco*, 767 F.2d at 1145. As such, "the Convention must be enforced according to its terms over all prior inconsistent rules of law." *Id.*; *accord Bautista* v. *Star Cruises*, 396 F.3d 1289, 1297 (11th Cir. 2005). That includes Section 1447(d).

Even before Section 16's enactment, this Court and other courts employed judicially-made equitable rules, such as the collateral order doctrine, to ensure the appealability of orders preventing arbitration because non-appealability would frustrate "Congress' clear intent, in the [FAA], to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. A denial of motion to compel arbitration under the Convention was also held appealable as a mandatory injunction under 28 U.S.C. § 1292(a)(1). *Sedco,* 767 F.2d at 1149. Indeed, in *Sedco*, the Convention was found to abrogate a longstanding rule of nonappealability of stays in admiralty law that otherwise would have barred the appeal of an order refusing to enforce an arbitration clause. *Id.* This bar was overridden "to carry out the important congressional policy of insuring that arbitration contracts are enforced in the courts pursuant to the Convention," as well as "to prevent the United States from violating its Treaty obligations with 65 nations." *Id.*

As an exercise of Congress's treaty power and as federal law, "[t]he Convention must be enforced according to its terms over all prior inconsistent rules of law." *Sedco,* 767 F.2d at 1145. The enactment of Section 16 only reinforces that duty, since Congress has now expressly commanded that appellate courts accept jurisdiction over orders denying arbitration under the Convention.

The Convention's goal was "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced." *Scherk*, 417 U.S. at 520 n.15. These obligations are reciprocal: to gain rights under the Convention, "Congress had to

guarantee enforcement of arbitral contracts and awards made pursuant to the Convention in United States courts." *McDermott* v *Lloyd's Underwriters of London*, 944 F.2d 1199, 1207 (5th Cir. 1991). *See* Convention, art. XIV, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; S. Rep. No. 91-702, at 3 (1970). As international trade has expanded in recent decades, "so too has the use of international arbitration to resolve disputes arising in the course of that trade." *Mitsubishi*, 473 U.S. at 638. A contractual provision "specifying in advance the forum in which disputes shall be litigated and the law to be applied is * * * an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," and "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 516-517.

Delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced "should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Id.* at 520 n.15 (citation omitted). The FAA, which incorporates the Convention, "demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international commercial context." *McCreary Tire & Rubber Co.* v. *Ceat*, 501 F.2d 1032, 1037 (3d Cir. 1974); *cf. Mitsubishi*, 473

U.S. at 625 n.14 (FAA was "designed to overcome an anachronistic judicial hostility to agreements to arbitrate").

The Fifth Circuit, and other courts that allow the general language of Section 1447(d) to defeat the specific conferral of jurisdiction in Section 16(a)(1), create just the kind of unpredictability and parochialism that the Convention sought to eliminate. As this Court has stated, "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.* The Fifth Circuit, and other courts following its approach, cede to such parochialism when they fail to abide by Congress's specific intent to provide federal appellate jurisdiction over all decisions declining to recognize rights to arbitration under the Convention.

Uniform federal appellate review ensures that the law of arbitrability furthers the federal policy favoring arbitration over litigation. "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute," which requires applying "*federal* substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]." *Mitsubishi*, 476 U.S. at 626 (emphasis added). Under that law, "questions of arbitrability

must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* at 24-25. [9]

As this case demonstrates, the Fifth Circuit's jurisprudence permits district courts to deny arbitration under the Convention exclusively on *state* contract law grounds with no federal appellate review, thus leaving such cases entirely in the hands of the state courts' interpretations of their own contract law. This result puts the Convention's enforceability into the hands of 50 state supreme courts, rather than the federal circuits. Because "disunity is directly proportional to the number of authorities speaking on any subject * * * federal-district-court Convention decisions are appealable of right to a court of appeals, ensuring uniformity of federal decisions at least on a multi-state basis." *McDermott*, 944 F.2d at 1212. The Fifth Circuit's view destroys this uniformity, undermining the United States' obligations under the Convention.

This result also incentivizes litigation gamesmanship and parochialism. *See Scherk*, 417 U.S. at 516-517 ("parochial refusal by the courts of one country to enforce an international arbitration agreement * * * invite[s] unseemly and mutually destructive jockeying by the parties"). A plaintiff can choose the state forum, the state law that will apply,

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[9] *See Trippe Mfg. Co.* v. *Niles Audio Corp.*, 401 F.3d 529, 532 (3rd Cir. 2005) (presumption in favor of arbitration applies "[w]hen determining both the existence and the scope of an arbitration agreement"); *Smith/Enron Cogeneration Ltd. P'ship* v. *Smith Cogeneration Int'l. Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable.").

and even the district court to which removal is anticipated. Here, for example, Pioneer chose the Louisiana forum; the agreements were interpreted under state law; and the case was remanded to a trial court in Baton Rouge, all without *any* federal appellate review of the decision. This favors the party that seeks to litigate and resist arbitration, and encourages forum-shopping to exploit the possibility of evading federal review, exactly the opposite of what Congress and the Convention's signatories intended.

This case exemplifies the gamesmanship inherent in the Fifth Circuit's rules of appealability. The District Court initially determined that it had jurisdiction under the Convention. App. 22a. Suddenly, after months of inaction, it remanded the case based on its construction of the parties' agreements under state contract law, providing no prior opportunity to note an appeal under Section 16(a)(1)(C). App. 38a. If the District Court had denied the Underwriters' motion to compel for the same reason (lack of a valid agreement) *without* remanding (as courts in other circuits would have done), it is indisputable that Section 16 would provide an immediate right to an interlocutory appeal. Nothing in the FAA authorizes district courts to hold the keys to the right to appeal.

To interpret Section 1447(d) to foreclose appeal of Convention cases, despite the FAA's plain provisions, "frustrate[s] the intention of Congress as reflected by the FAA and the [Convention] to give foreign parties the right to choose arbitration as a form of dispute resolution designed to save the parties time, money, and effort by substituting for the litigation process the advantages of speed, simplicity, and economy

associated with arbitration." *Dahiya* v. *Talmidge Int'l Ltd.*, 380 F.3d 218 (5th Cir. 2004) (DeMoss, J., dissenting from denial of rehearing en banc). "If the provisions of § 1447(d) will always trump the provisions of 9 U.S.C. § 16, then the Convention will be unenforceable" in states where Section 1447(d) determines appealability of Convention cases, and Congress's "elaborate efforts in Title 9 to give parties the right to choose arbitration in place of litigation can now be frustrated by the age-old controversy as to whether litigation was going to occur in the state courts or the federal courts." *Id.* The Court should grant review to unify to the law, and to quell the lower courts' subversion of federal treaty obligations.

III. ALTERNATIVELY, THE COURT SHOULD VACATE THE DECISION BELOW, AND REMAND TO THE FIFTH CIRCUIT FOR RECONSIDERATION SUPPORTED BY AN OPINION.

As explained above, certiorari is warranted in this case because the Fifth Circuit's jurisprudence—reflected in its prior decision in *Dahiya*—conflicts with this Court's precedents and the holdings of other circuits. But at a bare minimum, the Court should require the Fifth Circuit to state its reasoning for any decision in this case to deny the appellate right of review mandated in Section 16(a). This is not a case where a court of appeals has summarily affirmed the reasoning of a decision reached by a district court. Rather, the Fifth Circuit was the first—and only—lower court that could have opined on the question of appellate jurisdiction, and that court summarily dismissed the Underwriters' appeal without any opinion or even citation of authority. Accordingly, even if this Court were not inclined to

grant plenary review at this time, it should grant the petition, vacate the Fifth Circuit's judgment, and remand this case ("GVR") for that court to state a rationale for its actions.

In other cases, the Court has addressed the lack of an opinion on a matter of great importance by granting certiorari, vacating the opinion below, and remanding for an opinion from the lower court. For example, in *Taylor* v. *McKeithen*, 407 U.S. 191, 194 (1972), the Court issued a GVR in a civil rights case "[b]ecause this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals." Similarly, in *Northcross* v. *Memphis Bd. of Ed.*, 412 U.S. 427, 428-29 (1973), the Court issued a GVR where the decision below "was without stated reasons." And more recently, in *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006), where the majority on the state supreme court did not address the constitutionality of a search, the Court issued a GVR, stating that "it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia" on the issue.

A GVR is likewise warranted in this case. Indeed, neither the litigants nor this Court have the benefit of *any* opinion from *any* lower court on the dispositive question of appellate jurisdiction. The District Court ruled on the issue of arbitrability, but it was not asked to, nor could it have, opined on whether 28 U.S.C. § 1447(d) barred appeal of its order. That question was faced for the first time by the Fifth Circuit, in the form of Pioneer's motion to dismiss. That court, however, summarily granted the motion without setting the matter for further briefing or argument, without issuing an opinion,

and without providing even a citation of authority for its decision. App 1a.

As explained above, the Court can and should review the question presented in light of the conflict between the precedents of the Fifth Circuit and those of this Court and other circuits. But at a bare minimum, the Court should require the Fifth Circuit to explain its actions. To be sure, courts of appeals routinely issue summary affirmances of district court decisions where the trial court's reasoning (whether oral or written) is correct, and in those circumstances there is no need for a court of appeals to duplicate the analysis of the trial court. Here, however, there was not—and could not have been—any decision or reasoning by the District Court on the question of appellate jurisdiction. The Fifth Circuit was the sole arbiter on that question and it abdicated any responsibility to explain its actions.

Given the national and international importance of the issue, if the Court is not inclined to grant certiorari in the first instance it should, at a minimum, require the Fifth Circuit to reconsider the case and provide a rationale for its decision. Pioneer should not be able to evade review of the decision granting its motion to dismiss merely because the court of appeals elected not to explain that important decision.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed. In the alternative, the petition should be granted, the judgment below should be vacated, and the case should be remanded to the court of appeals for further consideration supported by an opinion.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 17 2009
CHARLES R. FULBRUGE III
CLERK

No. 09-31031

PIONEER NATURAL RESOURCES USA, INC.; PIONEER NATURAL RESOURCES COMPANY,

Plaintiffs - Appellees

vs.

ZURICH AMERICAN INSURANCE CO; MUTUAL MARINE OFFICE INC, on behalf of New York Marine & General Insurance COMPANY; XL INSURANCE COMPANY, Through XL Marine and Offshore Energy; ARCH INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; CERTAIN INTERESTED UNDERWRITERS AT LLOYDS LONDON, Watkins, Syn.# ; Hiscox, Syn.#0033; Wellington Syn.#2020; Navigators; Aspen Re; Aegis, Syn. #1225; O'Farrell, Sync #1036; Kiln,Syn.#0510; HCC; Brit, Syn.#2987; St. Paul Syn. #5000; SL, Syn #120; AMERICAN OFFSHORE INSURANCE SYNDICATE,

Defendants – Appellants

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellees' motion to dismiss the appeal for lack of subject matter jurisdiction is granted

[Judges' initials]

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.	**CIVIL ACTION**
	NUMBER 08-227-JVP-DLD
VERSUS	
ZURICH AMERICAN INSURANCE CO., ET AL	

MAGISTRATE JUDGE'S REPORT

This matter is before the Court on a motion to remand and for costs (rec. doc. 5) filed by plaintiffs, Pioneer Natural Resources U.S.A., Inc. and Pioneer Natural Resources Company. The motion is opposed by the Underwriter defendants (rec. doc. 21).[1]

Background

Plaintiffs are the owners of the East Cameron 322 platform and associated wells and well heads (EC

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[1] Defendants include the following Certain Underwriters at Lloyd's London and Certain London Market and Domestic Insurance Companies: Syndicate 457, Syndicate 33; Syndicate 2020; Syndicate 1225; Syndicate 5000; Syndicate 1036; Syndicate 1209; Syndicate 510; Syndicate 2987; Navigators Insurance Company; Aspen Insurance UK Limited; Houston Casualty Company; Commonwealth Insurance Company; Gard Marine & Energy Ltd; Zurich American Insurance Company; Mutual Marine Office, Inc. on behalf of N.Y. Marine & Gen. Ins. Co.; Arch Insurance Company; Liberty Mutual Insurance Company; American Offshore Insurance Syndicate; XL Specialty Insurance Company (through XL Marine & Offshore Energy) (rec. doc. 1-3).

322) located in the Gulf of Mexico, and the defendants are various companies and syndicates subscribing to a Package Insurance Policy CR-5591(the Package Policy) which covered EC 322 for the policy period of 15 June 2005 - 2006 (rec. doc. 1-6, Exhibit C). Plaintiffs allege in their original petition that they sustained damages of $50 million, excluding loss of income, related to the destruction of EC 322 by Hurricane Rita on September 23, 2005.[2]

Plaintiffs originally brought suit in state court against defendants under the Package Policy on August 8, 2007, for payment of insurance proceeds, breach of contract, detrimental reliance, and breach of duty of good faith and fair dealing.[3] On September 5, 2007, defendants filed a competing declaratory relief action in Texas asserting that Texas courts had exclusive jurisdiction over the matter based on a forum selection clause in the slip (rec. doc. 6, Exhibit

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[2] Plaintiffs allege in their memorandum in support of their motion to remand that they "incur and continue to incur damages projected to exceed $185 million related to the destruction of EC322 and the damage to the wells" (rec. doc. 1-8).

[3] Plaintiffs explain in their memorandum in support of motion to remand that in order "to avoid prescription or venue issues, on August 8, 2007, Pioneer filed four identical lawsuits in Louisiana state courts - Orleans Parish, Cameron Parish, Lafayette Parish, and East Baton Rouge Parish. Pioneer subsequently dismissed all except the Baton Rouge action as Underwriters agreed that all matters be allowed to proceed in Baton Rouge with Underwriters' reservations of their rights to assert forum non conveniens in Baton Rouge based on the Texas choice of law and jurisdiction provision based on the "slip" (rec. doc. 15, p. 9).

B).[4] On February 8, 2008, plaintiffs filed an amended petition for damages against defendants and specifically sought recovery under Section Three's excess coverage under the Package Policy (rec. doc. 1-9). On April 18, 2008, the Underwriter defendants removed this matter pursuant to the Federal Arbitration Act, 9 U.S.C. §§1 and 2, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§201-205, and 28 U.S.C. §1441, et. seq.

Defendants explain in their removal petition that plaintiffs allege coverage under Section Three of the Package Policy in the amended petition, and Section Three's "following form" provision incorporates the mandatory arbitration provision of the underlying AEGIS policy. The existence of a mandatory arbitration agreement which is not entirely between citizens of the United States supports removal under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), 9 U.S.C. §201, et. seq. Defendants therefore seek to invoke the Court's federal question jurisdiction pursuant to 28 U.S.C. §1331. Plaintiffs filed a motion to remand this matter to state court and for costs on May 5, 2008. Defendants have opposed the motion, and the matter is now before the Court for review.

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[4] The "slip" is the pre-policy/contract document that is used to place insurance in the London market. The Policy is the binding document that gives expansion to the terms contained in the "slip" (rec. doc. 15). The "slip" provides that "[t]he proper and exclusive law of this insurance shall be Texas law. Any dispute arising under or in connection with it shall be subject to the exclusive jurisdiction of the Texas courts." (rec. doc. 6, Exhibit B). This provision did not make it into the negotiated terms of the Package Policy.

The Insurance Policies

The Package Policy underwritten by defendant underwriters is divided into sections covering various types of coverage related to risks associated with an offshore platform. The Package Policy also covers different layers of coverage and is composed of both primary and excess layers. Of particular interest to the instant motion are sections one and three of the Package Policy. Section One provides for $5 million in coverage for physical damage to the platform, including a $5 million primary layer for Removal of Wreckage/Debris. Excess coverage over Section One is composed of two layers. The first layer of excess coverage is through Associated Electric & Gas Insurance Services Limited (AEGIS) in the amount of $35 million over the underlying $5 million of Section One of the Package Policy. The Package Policy comes into play again above the AEGIS policy. This second excess layer is under Section Three of the Package Policy and is in the amount of $65 million over the underlying $40 million ($5 million of Section One of the Package Policy and $35 million excess of $5 million under the AEGIS policy).[5]

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[5] There are other policies relevant to the claimed losses, but those policies are not relevant for purposes of the pending motion. Defendants, Mutual Marine Office, Navigators Management UK, Aspen Insurance, ACE European Group, and Lloyd's Syndicates 1036, 0457, 1221, 0033, 3000, 1225, 0609, 1183, and 1987 subscribe to Excess Liability Policy CR-7886, which was issued to Pioneer. Defendants, XL Specialty Insurance Company, ACE Insurance Company of Texas, Navigators Insurance Company, Houston Casualty Company, and Lloyd's Syndicate 1036 subscribe to Excess Liability Policy CR-5640, which was issued to Pioneer.

The "INSURING AGREEMENT" of Section Three of the Package Policy provides that Section Three will be governed by the terms and conditions of the underlying AEGIS policy:

> Subject to the Limit and Excess specified in the Declarations and any paramount exclusions contained in the General Conditions, this Section Three shall follow the terms and conditions maintained by the Named Insured with Associated Electric & Gas Insurance Services Limited ("AEGIS") — policy #X0602A1A05 — the "Underlying Insurance", including any separate or extract policy issued by or caused to be issued by AEGIS from the foregoing.

(rec. doc. 1-6, Notice of Removal, Exhibit "C").

There is no dispute that the AEGIS policy provides for mandatory arbitration, and, indeed, Pioneer and AEGIS are now in arbitration (rec. doc. no. 15). There are, however, many disputes over whether the mandatory arbitration provision of the AEGIS policy applies to Section Three of the Package Policy.

Law and Discussion

Standard on Removal and Remand

Remand is proper if at any time the court lacks subject matter jurisdiction. See 28 U.S.C. §1447(c). The removing party bears the burden of showing both that federal jurisdiction exists and, if challenged, that the removal was procedurally proper. See, e.g., *Manguno* v. *Prudential Property and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). The removal statute, 28 U.S.C. §1441, is strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand.

Gasch v. *Hartford Acc. & Indem. Co.*, 491 F.3d 278 (5th Cir. 2007); *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108-109, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941). However, "the general rule of construing removal statutes strictly against removal 'cannot apply to Convention Act cases because in these instances, Congress created special removal rights to channel cases into federal court.'" *Acosta* v. *Master Maint. & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006) (quoting *McDermott Int'l, Inc.* v. *Lloyds Underwriters of London*, 944 F.2d 1100, 1213 (5th Cir. 1991). Removal under the Convention is an exception to the general rules that a federal question ordinarily must appear on the face of a properly pleaded complaint, and an anticipated or actual federal defense generally does not qualify a case for removal. *Jefferson County, Ala.* v. *Acker*, 527 U.S. 423, 431, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999). Under the Convention, the grounds for removal may appear in the petition, but may also be shown in the petition for removal. See 9 U.S.C. §205; *Beiser* v. *Weyler*, 284 F.3d 665, 671 (5th Cir. 2002).

Substantive Law

The Federal Arbitration Act (FAA) governs the enforcement, validity, and interpretation of arbitration clauses in commercial contracts both in state and federal courts. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-42, 74 L.Ed.2d 765 (1983). Chapter 2 of the FAA, 9 U.S.C. §§201-208, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention), controls arbitration disputes in the international context. In general, the FAA creates a strong presumption in favor of arbitration, especially

in international commercial agreements. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40, 105 S.Ct. 3346, 3359-61, 87 L.Ed.2d 444 (1985).

Pursuant to Section 203 of the Convention, an action or proceeding falling under the Convention shall be deemed to arise under the laws and treatise of the United States; thus, the district courts of the United States are deemed to have original jurisdiction of such actions, regardless of the amount in controversy. See 9 U.S.C. §203. Section 205 of the Convention allows defendants to remove a state court action at any time prior to trial when the subject matter of the lawsuit "relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. §205.[6]

A matter "falls under the Convention" if it (1) involves an agreement in writing to arbitrate a dispute; (2) arises out of a commercial legal relationship; (3) provides for arbitration in the territory of a Convention signatory; and (4) involves a least one non-American citizen or concerns

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[6] Where the subject matter of an action or proceeding pending in a State court *relates to an arbitration agreement or award falling under the Convention*, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed. See 9 U.S.C. §205 (emphasis added).

property located abroad, involves performance or enforcement abroad, or has a reasonable relationship with a foreign state. See 9 U.S.C. §202; *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1144-1145 (5th Cir. 1985). The determination of whether the agreement "fall[s] under the Convention" will ordinarily prove quick and easy, without requiring too much merits-like investigation by the district court. *Beiser* v. *Weyler*, 284 F.3d 665, 672, FN7 (5th Cir. 2002).

In analyzing whether removal jurisdiction existed in *Beiser* v. *Weyler*, even though the arbitration agreement was between a defendant and a non-signatory, the Fifth Circuit focused on meaning of the phrase "relates to" in 9 U.S.C. §205. *Beiser*, 284 F.3d at 666, FN2. The Fifth Circuit broadly interpreted the term "relates to" and explained that "whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement "relates to" to the plaintiff's suit." *Beiser*, 284 F.3d, at 669. The *Beiser* court also explained that because Section 205 allows district courts to assess their jurisdiction from the pleadings alone, courts must be cautious not to "conflate the jurisdictional and merits inquiries into a single step." *Beiser*, 284 F.3d, 670.[7] The definition of "relates to" adopted by the *Beiser* court allows a determination of jurisdiction from the petition for removal itself, and keeps the jurisdictional and merits inquiries separate. Id., at 671. Thus, "absent the rare frivolous petition for removal, as long as the

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[7] Whether a federal court has jurisdiction to decide an issue is a different question from how to decide that issue correctly. *Beiser*, 284 F.3d, at 670; see also *Ostrowiecki* v. *Aggressor Fleet, Ltd.*, 2007 WL 4365442 (E.D. 2007).

defendant claims in its petition that an arbitration clause provides a defense, the district court will have jurisdiction to decide the merits of that claim." Id.

The *Beiser* court stressed the importance of a parties' right to appeal a decision on a motion to stay or compel arbitration and explained that delving too deeply into the merits on a jurisdictional inquiry and then remanding the case for lack of subject matter jurisdiction would deprive defendants of an opportunity to appeal issues regarding whether the matter should be stayed or compelled to arbitration. *Id.* see also *Dahiya* v. *Talmidge International, Ltd.*, 371 F.3d 207 (5th Cir. 2004); *Sedco, Inc.*, 767 F.2d at 1149; *McDermott International, Inc.* v. *Lloyds Underwriters of London*, 944 F.2d 1199, 1211-12 (5th Cir. 1991). Conscious of these issues, the Court is cautious not to delve into the merits and focuses on whether the allegations made in the amended petition or notice of removal are sufficient to establish jurisdiction.

Arguments of the Parties

The plaintiffs and defendants have advanced numerous arguments in support of their respective positions; however, both parties have lost sight of the pertinent issue in a motion to remand – which is simply whether the Court has subject matter jurisdiction based on the face of the pleadings and removal documents. Issues of whether the terms of the underlying AEGIS policy will be incorporated into the Package Policy, whether the parties will be compelled to arbitration based on contract interpretation, or whether a party has waived its right to arbitrate are based on the merits, are inapplicable to the decision on the motion to remand,

and are more appropriate for presentation in a subsequent motion.

Plaintiffs, for example, argue that this court does not have removal jurisdiction because the Convention does not apply. Plaintiffs argue that they did not agree that the terms of the underlying AEGIS policy would be incorporated into the Package Policy and require arbitration of their Section Three claims. Plaintiffs further argue that the Convention does not apply because the arbitration provision does not provide for arbitration in the territory of a Convention signatory. Both sides have submitted deposition testimony in support of their competing claims. Plaintiffs also contend that defendants have waived their right to arbitrate by filing the declaratory judgment action in Texas state court and have waived their right to remove by conducting discovery and vigorously defending the Baton Rouge state court action. Finally, plaintiffs suggest that if the Court finds that the Section Three claims are subject to arbitration, it should remand the Section Two claims because they are not related to the arbitration agreement.

Defendants respond that removal was proper because the arbitration agreement "falls under" the Convention and could conceivably affect the disposition of the case. Defendants state that plaintiffs consented to the agreement to arbitrate the dispute by drafting the terms of the Package Policy, which incorporates the arbitration provision in the underlying AEGIS policy. Defendants continue that the agreement to arbitrate arises out of a commercial legal relationship, arbitration can be compelled in this district, and the arbitration agreement is between citizens or subjects of one or more foreign

nations. Defendants deny that they explicitly waived their right to remove. Finally, defendants believe that plaintiffs' claims under Section Two of the Policy should remain with their Section Three claims because they "relate to" the arbitration provision covering plaintiffs' Section Three claims, and their inclusion would prevent double recovery of damages.

Analysis

In order for the Court to have subject matter jurisdiction, plaintiffs' claims must "relate to" an agreement "falling under the Convention." 9 U.S.C. §205. As the *Beiser* court explained, in order to make that determination, the court must determine first whether the arbitration provision "falls under the Convention." If the agreement falls under the Convention, then the second step is to determine whether the arbitration clause "relates to" the cause of action.

Does the arbitration agreement "fall under" the Convention?

An arbitration provision "falls under" the Convention if it: (1) involves an agreement in writing to arbitrate a dispute; (2) arises out of a commercial legal relationship; (3) provides for arbitration in the territory of a Convention signatory; and (4) involves at least one non-American citizen or concerns property located abroad, involves performance or enforcement abroad or has a reasonable relationship with a foreign state. 9 U.S.C. §202.

Defendants' notice of removal alleges that there is an agreement to arbitrate the dispute in this matter. Specifically, the notice of removal states that plaintiffs allege in their amended petition that defendants breached Section Three of the Package

Policy, which through the "INSURING AGREEMENT" language or "following form" provision, invokes the AEGIS policy's mandatory arbitration provision (rec. doc. 1-2).[8] There is no doubt the underlying AEGIS policy contains a mandatory arbitration agreement, as plaintiffs have already invoked the provision to resolve their claim for first tier excess removal of debris (rec. docs. 15 and 21, p. 9). Although plaintiffs spend much time advancing arguments based on contract interpretation and intent of the parties that the underlying AEGIS arbitration provision cannot be incorporated into the Package Policy to cover their Section Three claims, this is not the issue before the Court on the motion to remand. The questions of whether the arbitration provision in the AEGIS policy can be read into the Package Policy through the following form provision or whether a particular party can be compelled to arbitrate a particular issue are merits-based inquiries, separate from the Court's determination of whether it has jurisdiction to decide

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[8] Section Three, Article I of the Package Policy provides that "this Section Three shall follow the terms and conditions maintained by the Named Insured with Associated Electric & Gas Insurance Services Limited ("AEGIS") - policy #X0602A1A05..." (rec. doc. 102, p. 3). Pursuant to Section IV, Condition R, of the AEGIS policy, any controversy or dispute arising out of or relating to the Policy, or the alleged breach, termination or validity thereof, shall be resolved by the procedures specified in Conditions R, consisting of (1) good faith negotiations between executions with authority, toward resolution of any controversy or dispute arising out of the Policy, including exchange of position papers and meetings; (2) mediation with a neutral third party; and (3) if the controversy or dispute cannot be resolve via negation or mediation, it shall be subject to binding arbitration pursuant to, among other things, the U.S. Arbitration Act, 9 U.S.C. §1, et. seq.

the case either way. *Ostrowiecki*, 2007 WL 4365442, FN36; *Beiser,* 284 F.3d 670-671. There clearly is an arbitration agreement which arises out of a commercial relationship. And there clearly is a reasonable allegation that this arbitration agreement applies to Section Three of the Package Policy through the following form provision. Whether or not the plaintiffs ultimately will be bound by that agreement is a dispute for another day, but the first two requirements for jurisdictional purposes are met.

The third requirement is that the agreement provides for arbitration in the territory of a Convention signatory. The parties agree that the arbitration clause in the underlying AEGIS policy does not provide for a specific venue for arbitration. Rather, the provision states that "[t]he arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §1, et seq. ..." (rec. doc. 1-7, Exhibit D, p.19). If the Court were to find at a later date that the parties were bound by the agreement and that the Section Three claims were subject to mandatory arbitration pursuant to the terms of the underlying AEGIS policy, it would not be helpless to enforce the arbitration agreement. See *Jain* v. *de Méré*, 51 F.3d 686 (7th Cir. 1995). The Court has the power to compel arbitration in its own district by proceeding under 9 U.S.C. §4, which provides in pertinent part that "... [t]he hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. ..." Id. at. 690, *citing* 9 U.S.C. §4. Thus the third requirement is met.

The fourth requirement is that the agreement involves a least one non-American citizen or concerns property located abroad, involves performance or

enforcement abroad, or has a reasonable relationship with a foreign state. Defendants allege that several of the defendant Underwriters are citizens or subjects of one or more foreign nations; therefore, the Package Policy does not arise out of a relationship which is "entirely between citizens of the United States," and the Package Policy has a reasonable relation with one or more foreign states (rec. doc. 1-2). Plaintiffs are Delaware corporations, which are domiciled in and have their principal places of business in Texas (rec. doc. 1-8). Subscribers to the Package Policy include (1) nine Lloyd's syndicates[9]; (2) several London Market Insurance companies[10]; (3) Gard Marine & Energy Ltd., a Norwegian insurance company; and (4) Commonwealth Insurance Company, a Canadian Insurance Company (rec. doc. 21, Exhibits 3-4).

Based on the allegations in defendants' notice of removal, defendants have alleged facts sufficient to support a finding of that the alleged arbitration agreement "falls under the Convention."

Does the litigation "relate to" the arbitration clause?

Having found that the arbitration provision "falls under" the Convention, the Court must now determine whether the litigation "relates to" the arbitration clause for purposes of removal. Plaintiffs'

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[9] Syndicate numbers 457, 33, 2020, 1225, 5000, 1036, 1209, 510, and 1987 (rec. doc. 21, Exhibit 3). Syndicate 457 is a citizen of the United Kingdom. Id, Exhibit 4. The United Kingdom, Norway and Canada are all parties to the Convention. See notes to 9 U.S.C. §201.

[10] Navigators Insurance Company, Aspen Insurance UK Ltd., and Houston Casualty Company.

claims for coverage under Section Three of the policy must be interpreted in connection with Section Three's following form provision that arguably incorporates the mandatory arbitration provision in the AEGIS policy. Under the extremely loose requirements of "relates to" under 9 U.S.C. §205, as laid out by the Fifth Circuit in *Beiser*, the Court finds that the claims under Section Three relate to the arbitration agreement. Based on a subsequent motion by the parties, the Court will be able to make the determination whether claims under Section Three of the Policy should be compelled to arbitration.[11]

Plaintiffs also argue that their claims under Section Two do not "relate to" the arbitration agreement because Section Two involves a permissive, as opposed to mandatory arbitration agreement. Regardless of the merit to that argument, for the time being, the court may exercise supplemental jurisdiction over the Section Two claims. Whether or not these claims will be stayed or compelled to arbitration or ultimately remanded can be decided on another day, once the forum for the Section Three claims has been resolved.

Waiver of Removal

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11 Defendants suggest that the *Beiser* analysis is not necessary for plaintiffs' Section Three claims because the Section Three claims are subject to mandatory arbitration. Defendants' argument presupposes the underlying AEGIS policy is incorporated into the Package Policy via the following form provision and mandates arbitration of plaintiffs' Section Three claims. The Court declines to conduct a merits-based inquiry to make the determination as to whether the agreement to arbitrate will be incorporated on this motion, as it is more appropriate for a subsequent motion to compel arbitration.

Plaintiffs argue that even if there is an arbitration agreement under Section Three, defendants waived their right to remove by seeking "substantive relief in state courts in Baton Rouge and Texas" and engaging in discovery in those proceedings (rec. doc. 15). Plaintiffs' extensive reliance on *Certain Underwriters at Lloyd's* v. *Bristol-Myers Squibb Co.*, 51 F. Supp.2d 756 (E.D. Tex. 1999), is misplaced. The court in *Certain Underwriters at Lloyd's* v. *Bristol-Myers Squibb Co.*, supra, granted the motion to remand based on a finding that the insurers had waived their opportunity to remove under the Convention. This finding came after the insurers had realigned themselves as plaintiffs, filed a claim for recision of the insurance contract based on misrepresentation, and there had been a full trial on the merits on the recision claim. The Fifth Circuit in *McDermott International, Inc.* v. *Lloyds Underwriters of London*, 944 F.2d 1199, 1209-1210 (5th Cir. 1991), held that defendants may contractually waive the removal privilege under Section 205; however, the waiver must be explicit.

Section 205 allows for removal of a state court action "at any time before the trial thereof." Plaintiffs have outlined the time line of legal filings and discovery related to this action; however, it appears that there has not been a trial on the merits in either the Baton Rouge or Texas actions, and the plaintiffs only recently amended their petition to specifically add Section Three claims. Additionally, much of the legal maneuvering by the parties has been over the jurisdictional/forum issues. Thus, there is no evidence at this time that defendants have

explicitly waived their right to removal under Section 205.[12]

Conclusion and Recommendation

The agreement to arbitrate was raised in the notice of removal, and if applicable, it conceivably could affect the outcome of the litigation. The Fifth Circuit has clearly instructed the district courts not to delve into the merits of whether the arbitration agreement will be invoked based on a construction of the terms of the insurance contracts, testimony of witnesses, and other information gleaned through discovery during the jurisdictional inquiry. It is the existence of an arbitration agreement which could conceivably affect the outcome of litigation, not the enforceability of the agreement, which is at issue in this motion. Defendants may not ultimately prevail on a subsequent motion to compel arbitration, and they may one day be returned to state court, but that is an issue for another day. For the purposes of this motion to remand, defendants have made the requisite showing to establish that removal under 9 U.S.C. §205 was proper.

The Magistrate Judge finds that the litigation relates to an arbitration agreement that falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201-208, and therefore the matter was properly removed pursuant to 9 U.S.C. § 205. For the reasons stated above, the Magistrate Judge recommends that the plaintiffs'

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12 Matters of procedural arbitrability, such as, *inter alia*, whether the request for arbitration was timely under the arbitration agreement, are for the arbitrator to decide. See *Sedco*, 767 F.2d 1140, 1151, citing, *Commerce Park at DFW Freeport* v. *Mardian Constr. Co.*, 729 F.2d at 339, n.5 (5th Cir. 1984).

motion to remand and for costs (rec. doc. 5), should be **DENIED**.

Signed in Baton Rouge, Louisiana, on January 6, 2009.

_____/Docia L. Dalby/_____

MAGISTRATE JUDGE DOCIA L. DALBY

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.	**CIVIL ACTION**
	NUMBER 08-227-JVP-DLD

VERSUS

ZURICH AMERICAN INSURANCE CO., ET AL

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U.S. District Court.

In accordance with 28 U.S.C. §636(b)(1), you have ten days from date of receipt of this notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. A failure to object will constitute a waiver of your right to attack the factual findings on appeal.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Signed in Baton Rouge, Louisiana, on January 6, 2009.

/Docia L. Dalby/

MAGISTRATE JUDGE DOCIA L. DALBY

APPENDIX C
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.

FILED
U.S. DIST COURT
MIDDLE DISTRICT OF LA
2009 FEB 10 P 4:05
SIGN _____
BY DEPUTY CLERK

VERSUS CIVIL ACTION NO.: 08-227-JVP-DLD

ZURICH AMERICAN INSURANCE CO., ET AL

RULING ON MOTION FOR MOTION TO REMAND

The court has carefully considered the petition, the record, the law applicable to this action, and the Report and Recommendation of United States Magistrate Judge Dalby dated January 6, 2009 (doc. 56). Plaintiff has filed an objection and defendant has filed a response to that objection, which merely restate legal argument and do not require *de novo* factual findings under 28 U.S.C. § 636.

The court hereby approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein.

Accordingly, the motion to remand and for costs (doc. 5) is hereby **DENIED**.

Baton Rouge, Louisiana, February 10th, 2009.

__/James J. Brady, U.S.D.J. for/_____
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.

VERSUS

ZURICH AMERICAN INSURANCE CO., ET AL

FILED
U.S. DIST COURT
MIDDLE DISTR OF LA
2009 OCT - 7 P 1:48
SIGN _____
BY DEPUTY CLERK

CIVIL ACTION

NO. 08-227-JVP-DLD

RULING

This matter is before the court on a motion by defendants, Certain Underwriters at Lloyd's London, and Certain London Market and Domestic Insurance Companies ("Underwriters") to compel arbitration of all of plaintiffs' claims, or, in the alternative, to compel arbitration of a portion of the claims and stay others pending resolution of the claims submitted to arbitration (doc. 74).

This matter is also before the court on a joint motion by plaintiffs, Pioneer Natural Resources, U.S.A., Inc. and Pioneer Natural Resources Company (jointly "Pioneer"), to remand a portion of the claims (doc. 81). The motions are opposed. Jurisdiction is alleged under 9 U.S.C.§ 203 and 28 U.S.C. §. 1331. Oral argument was heard on the motions and the matter is now submitted.

FACTS AND PROCEDURAL HISTORY

At all times pertinent to this action, plaintiffs were owners and operators of offshore platforms, pipelines and other facilities in the Gulf of Mexico, including East Cameron 322 Platform ("EC322") and its associated wells. On September 23, 2005, Hurricane Rita passed over EC322 and caused the platform to collapse. This action arises out of disputes related to the subsequent insurance claims filed by Pioneer.

Pioneer asserts insurance claims under Energy Package Policy No. CR—5591 and EJLPN0205 ("Package Policy"), certain coverage sections of which the Underwriters severally subscribed. The Package Policy, effective June 15, 2005 through June 15, 2006, provides several types of coverage.

Section One of the Package Policy provides insurance coverage for physical damage to the platform, including $5 million coverage for removal of Wreckage and Debris ("R.O.D"). Section Two provides coverage for Control of Well Insurance, Redrilling/Extra Expense, and Seepage and Pollution, Cleanup and Contamination. Section Three of the Package Policy, Excess Liabilities, provides $35 million excess coverage for R.O.D. in a policy issued to Pioneer by Associated Electric & Gas Insurance Services Limited ("AEGIS"). The Third Section also provides a second layer of excess coverage in the amount of $65 million. Section Six provides coverage for loss of production income.

Plaintiffs brought suit against the Underwriters under the Package Policy in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana on August 8, 2007. Pioneer claimed damages of $50 million, excluding loss of income

related to the destruction of oil platform and alleged breach of contract, detrimental reliance and breach of duty of good faith and fair dealing, as well as a right to payment of insurance proceeds. Defendants, on September 5, 2007 filed a declaratory action in Texas asserting that Texas had exclusive jurisdiction over the matter. On February 8, 2008, plaintiffs filed an amended petition seeking recovery under the excess coverage provided by Section Three of the Package Policy (doc. 1-9). Then, on April 18, 2008, defendants removed this matter pursuant to the Federal Arbitration Act, 9 U.S.C. §§1 and 2, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 9 U.S.C. §§201-205, and 28 U.S.C. §1441, et. seq.

In support of removal, defendants assert that a "following form" provision in Section Three of the Package Policy incorporates a mandatory arbitration provision in the underlying AEGIS policy. Because parties to the agreement are not citizens of the United States, defendants argue that the existence of a mandatory arbitration provision renders the agreement subject to interpretation under the Convention and therefore provides federal question jurisdiction pursuant to 28 U.S.C. §1331.

There is no dispute that the AEGIS policy provides for mandatory arbitration, and Pioneer and AEGIS have engaged in arbitration of the disputes arising under that policy. Pioneer however, disputes the Underwriters' assertion that the rest of the Package Policy is subject to mandatory arbitration.

On May 5, 2008, Pioneer moved for remand asserting that the following form provision of Section Three does not incorporate the mandatory arbitration provision of the AEGIS policy into the

Package Policy and that the Convention is therefore not applicable to the dispute. In denying the May 5, 2008 motion to remand, the court stated:

> Although plaintiffs spend much time advancing arguments based on contract interpretation and intent of the parties that the underlying AEGIS arbitration provision cannot be incorporated into the Package Policy to cover their Section Three claims, this is not the issue before the Court on the motion to remand. The questions of whether the arbitration provision of the AEGIS policy can be read into the Package Policy through the following form provision or whether a particular party can be compelled to arbitrate a particular issue are merits-based inquiries, separate from the court's determination of whether it has jurisdiction to decide the case either way.

(Doc. 56, pp 10-11).

The court then found that "defendants have alleged facts sufficient to support a finding that the alleged arbitration agreement "falls under the Convention," but the court also noted that "[w]hether or not these claims will be stayed or compelled to arbitration or ultimately remanded can be decided on another day, once the forum for the Section Three claims has been resolved." (Doc. 56, pp. 11, 12).

Shortly thereafter, the court dismissed a motion to stay pending arbitration specifically stating that the dismissal was without prejudice to defendants to file a motion to compel arbitration and/or stay litigation in order to squarely present the pertinent issues, along with any evidentiary materials necessary for the motion" (doc. 62). Accordingly, defendants filed

the current Motion to Compel Arbitration and/or Motion to Stay Litigation (doc. 74), and plaintiffs filed the current motion to Remand Section Two Claims (doc. 81).

LAW AND DISCUSSION

The Underwriters assert that the "following form" provision in Section Three of the Package Policy unambiguously incorporates the mandatory arbitration provision of the AEGIS policy. They further argue that, based upon that incorporation of a mandatory arbitration clause into the policy, it is subject to a federal analysis under the criteria set forth in *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat. Oil Co.*, 767 F.2d 1140 (5th Cir. 1985).

Pioneer argues that upon application of the appropriate state law to the contract, the following form provision in Section Three does not incorporate the mandatory arbitration provision of the AEGIS policy into the Package Policy and, therefore, fails to meet the threshold requirement for the application of the *Sedco* analysis. The Underwriters, however, argue that state law should play no part in the court's resolution of the motion before it (doc. 83, p. 5). Specifically, the Underwriters argue that the court need not apply state law to determine a threshold question of whether there is an agreement to arbitrate the dispute, because the first inquiry of the *Sedco* analysis asks whether there is an agreement in writing to arbitrate the dispute.[1] *Id*

---

[1] The four questions that compose the "limited inquiry" set forth in *Sedco* are as follows: (1) is there an agreement in writing to arbitrate the .dispute; in other words, is the arbitration agreement broad or narrow; (2) does the agreement provide for arbitration in the territory of a Convention signatory; (3) does the agreement to arbitrate arise out of a

The court disagrees with the Underwriters' interpretation of the principles established in *Sedco.* In *Sedco,* there was no dispute that the parties had agreed in writing that they would submit to arbitration "any dispute or difference between the parties." After noting that fact, the court stated that "[t]he Convention contemplates a very limited inquiry by courts when considering a motion to compel." *Sedco,* 767 F.2d at 1144. The *Sedco* court then listed the four questions that a court must answer when considering a motion to compel arbitration under the Convention.

The first inquiry in the *Sedco* analysis requires the court to ask, "is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration broad or narrow; . . . . ?" *Id.* A footnote further elaborated on the first inquiry of the *Sedco* analysis as follows:

> As the court in *Prudential Lines, Inc.* v. *Exxon Corp.,* 704 F.2d 59, 64 (2d Cir 1983) said: [s]imply stated, a court should compel arbitration, and permit the arbitrator to decide whether the dispute falls within the clause, if the clause is "broad." In contrast, if the clause is "narrow," arbitration should not be compelled unless the court determines that the dispute falls within the clause. Specific words or phrases alone may not be determinative although words of limitations would indicate a narrower clause. The tone of the clause as a whole must be considered.

Sedco, 767 F.2d at 1144-45, n. 10.

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commercial legal relationship; (4) is a party to the agreement not an American citizen? *Sedco,* 767 F.2d at 1144-45.

Clearly, the first inquiry of the *Sedco* analysis addresses the scope of an arbitration agreement rather than its existence. It presumes that a valid, written agreement to arbitrate exists and asks whether that written agreement to arbitrate covers the specific dispute before the court. If the written arbitration agreement is arguably broad enough to cover the dispute at issue, the court should refer the matter to arbitration to determine whether arbitration is the proper forum for resolution of the underlying dispute.

The distinction between the existence of a written agreement to arbitrate and the scope of such an agreement is significant because different standards apply. If the parties have clearly agreed to a broad mandatory arbitration clause that arguably covers the substantive dispute between them, then they can hardly object to arbitration as a means of determining whether the underlying dispute is properly a subject of arbitration. That approach is consistent with the goal of the Convention "to encourage recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." See e.g., *Acosta* v. *Master Maintenance and Constr. Inc.*, 452 F.3d 373, 376 (5th Cir. 2006); *Scherk* v. *Alberto-Culver* Co., 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). That approach also reflects an "unambiguous policy in favor of recognition of arbitration agreements falling under the Convention." *Acosta,* 452 F.3d at 376-77 (noting that provisions of the Federal Arbitration Act "independently and explicitly empower[] courts to

compel arbitration in accordance with the arbitration agreements involved").[2]

However, "[f]ederal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ordinary contract principles determine who is bound." *Datatreasury Corp.* v. *Wells Fargo & Co.*, 522 F.3d 1368, 1372 (5th Cir. 2008); see also *Graves* v. *BP America, Inc.*, 568 F.3d 221 (5th Cir. 2009) (stating that the issue of a valid agreement to arbitrate is controlled by "ordinary state-law principles that govern the formation of contracts," whereas the scope of the arbitration clause is determined "by applying the federal substantive law of arbitrability"). Thus, "in deciding whether there is a valid agreement between the parties, the Fifth Circuit applies state law." *Id.* at 1371 (citing *Fleetwood Enters., Inc.* v. *Gaskamp*, 280 F.3d 1069, 1072 (5th Cir. 2002).

The Package Policy contains forty-two "General Insuring Conditions," which are "APPLICABLE TO ALL SECTIONS OF THIS POLICY" (doc. 1-5, pp. 23-25 (emphasis in original)). Clause Thirty-Six of the General Insuring Conditions is captioned "Disputes," and paragraph A of that clause addresses arbitration as follows:

> In the event it is mutually agreed by the Assured and Underwriters to arbitrate any dispute arising under this Policy, the matter

[2] *See*, 9 U.S.C, § 206: A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

> shall be submitted for arbitration in accordance with the following . . .

(Policy, General Insuring Conditions, Cl. 36 ¶ A (doc. 1-5, p. 33)).

The plain language of the arbitration provision demonstrates that mutual agreement is a prerequisite for dispute resolution through arbitration. Thus, the policy specifically provides for permissive arbitration rather than mandatory arbitration. Moreover, Clause Thirty-Six also provides that:

> If any dispute is not resolved through arbitration in accordance with paragraph A. of this Clause 36, it is agreed that in the event of the failure of the Underwriters severally subscribing this insurance (the Underwriters) to pay any amount claimed to be due hereunder, the Underwriters, at the request of the Assured, will submit to the jurisdiction of a court of competent jurisdiction within the United States of America.

(*Id.* at, ¶ B (p. 34)).

Clause 40 of the General Insuring Conditions further provides that the "policy shall be subject to the applicable US state or US federal law to be determined by the court of competent jurisdiction as determined by the provisions of the Service of Suit Clause (USA) CL 355." *Id.* at Cl. 40 (p. 35).

Thus, the parties agreed not only that mutual agreement is a condition that must be met before a dispute can be submitted to arbitration, put also specifically provided for suit in a court of competent jurisdiction in the event that they do not mutually agree to arbitrate the dispute. The Underwriters,

however, argue that the following form provision of Section Three of the policy renders that section subject to mandatory arbitration. The following form provision provides:

> Subject to the Limit and Excess specified in the Declarations and any paramount exclusions contained in the General Conditions, this Section Three shall follow the terms and conditions maintained by the Named Insured with Associated Electric & Gas Insurance Services Limited ("AEGIS") — policy # X0602A1A05 — the "Underlying Insurance", including any separate or extract policy issued by or caused to be issued by AEGIS from the foregoing.

(Policy, § 3, CL 1 (doc. 1-6, p. 23)).

The underlying AEGIS policy provides in pertinent part:

> Any controversy or dispute arising out of or relating to this POLICY, or the breach, termination or validity thereof, which has not been resolved by non-binding means as provided herein within ninety (90) days of the initiation of such procedure, shall be settled by binding arbitration in accordance with the CPR Institute Rules for Non-Administered Arbitration of Business Disputes (the "CPR Rules") by three (2) independent and impartial arbitrators.
>
> * * *
>
> The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §§ 1, et seq., and judgment upon the award rendered

> by the arbitrators may be entered by any court having jurisdiction thereof.

(AEGIS Policy, § IV(R), ¶ 3 (doc. 1-7, p. 19).

The mandatory arbitration provision of the AEGIS Policy, incorporated into the agreement by the following form provision in Section Three, clearly conflicts with provisions of the General Insuring Conditions which provide for arbitration only upon mutual consent and also provide for suit in the absence of such mutual consent to arbitration. Therefore, the threshold question before the court is whether, under "ordinary state-law principles that govern the formation of contracts," the policy demonstrates that the parties made a valid agreement to arbitrate. In answering that question, the court need not determine whether Louisiana or Texas law controls, because the result is the same under either.

Under Louisiana law, "[a]n insurance policy is a contract between parties and should be construed employing the general rules of interpretation of contracts set forth in the Louisiana Civil Code. *Reynolds* v. *Select Props., Ltd.*, 634 So.2d 1180, 1183 (La.1994). "Contract interpretation is a determination of the common intent of the parties." *Casares* v. *James M. Brown, Builder, Inc.*, _ So. 3d _, 2009 (La.App. 2 Cir. 2009) (quoting, La.Civ.Code art. 2045). Moreover, "[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." *Id.*, (quoting La.Civ. Code art. 2050). "That any ambiguity in an insurance policy is to be strictly construed against the insurer and in favor of the insured is a maxim so well known in the law as to require no need to resort to authority in

support thereof." *Pizzetta* v. *Lake Catherine Marina, LLC*, 995 So.2d 26, 28 (La.App. 4 Cir. 2008).

Under Texas law, "[i]t is.a fundamental rule of law that insurance policies are contracts and as such are controlled by rules of construction which are applicable to contracts generally." *Barnett* v. *Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex.2003). Moreover:

> Whether a contract, like an insurance policy, is ambiguous is a question decided by examining the entire contract in light of the circumstances present when the parties entered the contract. A policy is unambiguous, as a matter of law, if the court can give it a definite legal meaning. On the other hand, if a policy is subject to more than one reasonable interpretation, we must adopt the construction most favorable to the insured when we resolve the uncertainty.

State Farm Fire and Cas. *Co.* v. *Vaughan,* 968 S.W.2d 931, 933 (Tex.1998) (internal citations omitted).

The incorporation of a mandatory arbitration clause into the Third Section of an insurance agreement that also contains permissive arbitration and right to sue clauses that are "APPLICABLE TO ALL SECTIONS OF THIS POLICY," creates ambiguity. It could be argued that incorporation of the mandatory arbitration clause creates an exception in Section Three to the permissive arbitration that is otherwise applicable to the rest of the policy. Construing the contract in that manner, however, requires the court to ignore the fact that the policy contains specific language in bold, capital

letters providing that permissive arbitration is "APPLICABLE TO ALL SECTIONS OF THIS POLICY." It could also be argued that the parties specifically bargained for, and agreed, that all sections of the Package Policy would be subject to the permissive arbitration provision in the General Insuring Conditions, thus creating an exception to the following form provision insofar as it might otherwise be construed as providing for mandatory arbitration of disputes arising under Section Three.

As noted above, whether the court applies Texas or Louisiana law, ambiguity in an insurance policy must be construed in favor of the insured. Accordingly, the court concludes that no valid agreement exists between the parties to submit the disputes to arbitration.

This action was removed on an allegation of federal question jurisdiction based upon the applicability of the Convention to this dispute. Though the notice of removal alleged facts sufficient to defeat the May 5, 2008 motion to remand, the court specifically noted in its ruling on that motion that the ruling was not based on an evaluation of the merits or contract interpretation.[3]

The Underwriters' motion to compel arbitration, however, requires the court in this ruling to engage in contract interpretation. In doing so, the court has determined that the Package Policy does not present a valid agreement to arbitrate. Because the Convention only applies to valid commercial arbitration agreements in international contracts the court also concludes that the Convention is not

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[3] See *supra*, Facts and Procedural History (*citing* doc. 56, pp. 10-12)

applicable to the dispute before the court and federal question jurisdiction is, therefore, absent.

Federal courts are courts of limited jurisdiction, and "[a]bsent jurisdiction conferred by statute, district courts lack the power to consider claims." *Veldhe[illegible] United States Coast guard,* 35 F.3d 222, 225 (5th Cir. 1994). Moreover, pursuant to 28 U.S.C. §1447(c), "[i]f at any time before final judgment, it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

CONCLUSION

Accordingly, this matter shall be **REMANDED** to the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

Baton Rouge, Louisiana, October 7, 2009.

/John V. Parker/
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PIONEER NATURAL RESOURCES, U.S.A., INC., ET AL.

FILED
U.S. DIST COURT
MIDDLE DIST OF LA
2009 OCT - 7 P 1:48
SIGN _____
BY DEPUTY CLERK

VERSUS

CIVIL ACTION
NO. 08-227-JVP

ZURICH AMERICAN INSURANCE CO., ET AL

ORDER

In accordance with the ruling of the court (98);

IT IS ORDERED that this matter be remanded to the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

Baton Rouge, Louisiana, October 7, 2009.

_____/John V. Parker/_____
JOHN V. PARKER, JUDGE
MIDDLE DISTRICT OF LOUISIANA

cc: 19th JDC

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-31031

PIONEER NATURAL RESOURCES USA, INC.; PIONEER NATURAL RESOURCES COMPANY,

Plaintiffs - Appellees

vs.

U.S. COURT OF APPEALS
FILED
JAN. 27 2010
CHARLES R. FULBRUGE III
CLERK

ZURICH AMERICAN INSURANCE CO; MUTUAL MARINE OFFICE INC, on behalf of New York Marine & General Insurance COMPANY; XL INSURANCE COMPANY, Through XL Marine and Offshore Energy; ARCH INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; CERTAIN INTERESTED UNDERWRITERS AT LLOYDS LONDON, Watkins, Syn.# ; Hiscox, Syn.#0033; Wellington Syn.#2020; Navigators; Aspen Re; Aegis, Syn. #1225; O'Farrell, Sync #1036; K1ln,Syn.#0510; HCC; Brit. Syn.#2987; St. Paul Syn. #5000; SL, Syn #120; AMERICAN OFFSHORE INSURANCE SYNDICATE,

Defendants – Appellants

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir. _____, _____ F.3d _____)

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

__/Patrick S. Higginbotham/__
United States Circuit Judge

APPENDIX G

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 201 *et seq.*

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have

original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether

that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C. § 16

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

28 U.S.C. § 1447(d)

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Supreme Court, U.S.
FILED
JUN 28 2010
OFFICE OF THE CLERK

No. 09-1305

IN THE
Supreme Court of the United States

ZURICH AMERICAN INSURANCE COMPANY, ET AL.,
Petitioners,

v.

PIONEER NATURAL RESOURCES USA, INC. AND
PIONEER NATURAL RESOURCES COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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June 28, 2010

QUESTION PRESENTED

Whether 28 U.S.C. §1447(d) prohibits appellate review of a district court order remanding for lack of subject matter jurisdiction a case removed under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §205.

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20 U.S.C. §1617 (1972) (repealed 1978) 25

28 U.S.C. §1291 8

28 U.S.C. §1446 19

28 U.S.C. §1447 19

28 U.S.C. §1447(c) 5, 22

28 U.S.C. §1447(d) 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20

STATEMENT

1. This case is a dispute about insurance coverage for the East Cameron 322 drilling platform ("EC 322") in the Gulf of Mexico. Respondent Pioneer Natural Resources USA, Inc. owned EC 322, and respondent Pioneer Natural Resources Company held insurance policies that provided coverage for damage to EC 322 and resulting liability. One of these policies was Package Insurance Policy No. CR-5591 (the "Package Policy"). Petitioners are underwriters that are responsible to pay claims under the Package Policy. *See* Pet. App. 24a-25a.

The Package Policy applies to the period from June 15, 2005, until June 15, 2006. Section 1 of the Package Policy covers damage to EC 322 and related property. Section 2 covers expenses for bringing related wells under control. Section 3 covers liability expenses to the extent they exceed respondents' coverage under a separate policy issued by Associated Electric & Gas Insurance Services Limited (the "AEGIS Policy"). *See id.* at 25a.

The Package Policy contains multiple dispute resolution provisions. As a whole, the Package Policy is subject to General Insuring Conditions, which by their terms are "APPLICABLE TO ALL SECTIONS OF THIS POLICY." *Id.* at 31a. Paragraph 36(A) of those general conditions provides a process to be followed "[i]n the event it is mutually agreed by [respondents] and [petitioners] to arbitrate any dispute arising under this Policy." *Id.* Paragraph 36(B) provides that

> [i]f any dispute is not resolved through arbitration in accordance with Paragraph [36(A)], it is agreed that in the event of the failure of [petitioners] to pay any amount claimed to be

> due hereunder, [petitioners], at the request of [respondents], will submit to the jurisdiction of a court of competent jurisdiction within the United States of America.

Id. at 32a. Respondents have not agreed to arbitrate their claims in this case under Paragraph 36(A).

Section 3 of the Package Policy also contains a "following form" clause, which provides that, "[s]ubject to the Limit and Excess specified in the Declarations and any paramount exclusions contained in the General Conditions, this Section Three shall follow the terms and conditions" of the AEGIS Policy. *Id.* at 33a. Among those terms and conditions is a mandatory arbitration clause that applies to "[a]ny controversy or dispute arising out of or relating to [the AEGIS Policy], or the breach, termination or validity thereof." *Id.*

2. On September 23, 2005, Hurricane Rita destroyed EC 322 and severely damaged other property covered by the Package Policy. *See* Pet. App. 4a, 25a. Respondents notified petitioners of their losses and later filed a claim under the Package Policy.

Respondents have alleged that petitioners appointed a claims representative, and respondents agreed with the representative about appropriate repairs and remedial work that Pioneer would undertake. *See* Notice of Removal, Exh. B ¶¶ 15-19. Respondents then undertook substantial and costly repairs in reliance on the Package Policy and on that agreement. *See id.* ¶¶ 21-29. Petitioners later took the position that no agreement had been reached and that some of the repairs undertaken were outside the Package Policy's coverage. *See id.* ¶¶ 30, 35, 37.

3. On August 8, 2007, respondents brought an action in Louisiana state court seeking to recover un-

der state law, including (1) under the Package Policy, (2) for breach of contract, (3) for reliance on petitioners' representations, and (4) for breach of petitioners' duties of good faith and fair dealing. *See* Pet. App. 25a-26a. On February 8, 2008, respondents filed an amended petition for damages that stated a claim under Section 3 of the Package Policy. *See id.* at 26a.

On April 18, 2008, petitioners removed the action to the Middle District of Louisiana. The sole basis for federal subject matter jurisdiction stated in the notice of removal was petitioners' allegation that this case involved an "arbitration agreement . . . falling under" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §205. *See* Notice of Removal ¶ 10. In support of that allegation, petitioners claimed that the "following form" provision of Section 3 of the Package Policy incorporated the mandatory arbitration provision of the AEGIS Policy. *See* Pet. App. 5a, 26a. Respondents moved to remand, denying that the Package Policy provided for mandatory arbitration. *See id.* at 5a. The motion was referred to a magistrate judge.

4. On January 6, 2009, the magistrate judge recommended that the district court deny respondents' motion to remand. She reasoned that the AEGIS Policy's mandatory arbitration provision was "an arbitration agreement [that] could conceivably affect the outcome of litigation" and that this sufficed to confer subject matter jurisdiction on the district court. Pet. App. 19a; *see id.* at 10a-11a (discussing *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002)).

The magistrate judge declined to engage in any "construction of the terms of the insurance contracts." *Id.* at 19a. The only question she considered was whether petitioners had made "a reasonable

allegation that [the] arbitration agreement [from the AEGIS Policy] applies to Section Three of the Package Policy through the following form provision." *Id.* at 15a. She cautioned that, because her inquiry was only preliminary, petitioners "m[ight] not ultimately prevail on a subsequent motion to compel arbitration, and they m[ight] one day be returned to state court." *Id.* at 19a.

On February 10, 2009, the district court adopted the magistrate judge's report and recommendation. *Id.* at 22a. Petitioners moved to compel arbitration of the Section 3 claims.

5. On October 7, 2009, the district court remanded the case to state court. The court first applied "ordinary contract principles" under state law to determine whether Section 3's following-form clause incorporated the mandatory arbitration provision from the AEGIS Policy. Pet. App. 31a (internal quotation marks omitted). It reasoned that "[t]he incorporation of a mandatory arbitration clause into the Third Section of an insurance agreement that also contains permissive arbitration and right to sue clauses that are 'APPLICABLE TO ALL SECTIONS OF THIS POLICY,' creates ambiguity" in the Package Policy. *Id.* at 35a. Because the Package Policy is an insurance policy, it then "construed [the policy] in favor of the insured," *i.e.*, respondents, and as a result concluded that "no valid agreement exists between the parties to submit the disputes to arbitration." *Id.* at 36a.

The district court then considered the effect of this conclusion on its jurisdiction. It noted that its previous ruling, in the form of the magistrate judge's adopted report and recommendation, had not been "based on an evaluation of the merits or contract

interpretation." *Id.* Its consideration of the motion to compel, however, had "require[d] the court . . . to engage in contract interpretation." *Id.* Having done so, and having concluded that "the Package Policy does not present a valid agreement to arbitrate," the court concluded that "the Convention is not applicable to the dispute before the court and federal question jurisdiction is, therefore, absent." *Id.* at 36a-37a.

Quoting 28 U.S.C. §1447(c)'s directive that "'[i]f at any time before final judgment, it appears that the district court lacks subject matter jurisdiction, the case shall be remanded,'" the district court then remanded the case. *Id.* at 37a (alteration in original). It did not rule on petitioners' motion to compel.

6. On October 27, 2009, petitioners filed a notice of appeal, which stated their intent to "appeal . . . from the [district court's] Order . . . remanding this action" to state court. Notice of Appeal at 1. Respondents moved to dismiss the appeal for lack of appellate jurisdiction. On December 17, 2009, the court of appeals issued a one-sentence unpublished, per curiam order dismissing the appeal for lack of jurisdiction. *See* Pet. App. 1a-2a. Petitioners then sought rehearing en banc, which the court of appeals denied. *See id.* at 39a-40a.

In their motion before the court of appeals, respondents relied on *Dahiya v. Talmidge International, Ltd.*, 371 F.3d 207 (5th Cir. 2004), and *Certain Underwriters at Lloyd's London v. Warrantech Corp.*, 461 F.3d 568 (5th Cir. 2006). *See* Appellees' Mot. To Dismiss at 3-8. Petitioners did not suggest in response that *Dahiya* or *Warrantech* was inconsistent with *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009), or *Osborn v. Haley*, 549 U.S. 225 (2007).

Indeed, petitioners did not even cite those cases to the court of appeals. Petitioners also never called the attention of the court of appeals to *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), or any of the other decisions they now claim conflict with *Dahiya* and *Warrantech*.[1] They argued instead that *Dahiya* and *Warrantech* were distinguishable, inconsistent with the Fifth Circuit's own precedent, or inconsistent with *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), which is not mentioned in the petition. *See* Appellants' Opp. to Mot. To Dismiss at 5-8 & n.10; Appellants' Pet. for Reh'g En Banc at v-vi n.3, 1-2.

REASONS FOR DENYING THE PETITION

Petitioners have failed to show that this case warrants review by this Court. There is no conflict between the one-sentence unpublished, per curiam order of the court of appeals and this Court's decisions in *Arthur Andersen* or *Osborn*. That is particularly true in light of this Court's decision in *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224 (2007), which rejected arguments very similar to those that petitioners advance here. No conflict exists between the court of appeals' judgment and any decision of any other circuit. The cases on which petitioners rely are easily distinguishable and, in the case of the Ninth Circuit's decision in *Reddam*, no longer good law in light of intervening Supreme Court precedent.

Petitioners also have failed to show that either the court of appeals or the district court erred in this case or that their decisions otherwise warrant review.

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[1] *See* Pet. 20-22 (citing *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005), and *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000)).

The Fifth Circuit's ruling that it lacked appellate jurisdiction was correct in light of *Powerex* and this Court's cases holding that 28 U.S.C. §1447(d) bars appellate review of a remand for lack of subject matter jurisdiction. The district court's conclusion that it lacked subject matter jurisdiction was also correct, although this Court likely would not reach that question even if it granted review.

Finally, a grant, vacate, and remand ("GVR") order is not warranted in this case. The summary disposition of this matter by the Fifth Circuit was entirely appropriate, especially given that petitioners themselves failed to cite to that court the cases they say it should have followed, and no intervening developments warrant vacatur and remand.

I. NO CONFLICT EXISTS TO JUSTIFY REVIEW BY THIS COURT

A. The Fifth Circuit's Order Does Not Conflict with Any Decision of this Court

The Fifth Circuit's order dismissing petitioners' appeal is consistent with (indeed, was compelled by) this Court's "relentlessly repeated" instruction that "'any remand order issued on the grounds specified in §1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court.'" *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (quoting *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976)) (alteration in *Kircher*). Nothing in the cases on which petitioners rely undermines the application of that rule to this case.

1. Petitioners' claimed conflict with Arthur Andersen *has no merit.*

The Fifth Circuit's judgment does not conflict with *Arthur Andersen*. *See* Pet. 12-14. *Arthur Andersen* involved 9 U.S.C. §16(a)(1)(A), which permits immediate appeal from "an order . . . refusing a stay of any action under [9 U.S.C. §] 3," which is part of the Federal Arbitration Act. Section 16(a)(1)(A) is an exception to the rule that only final judgments of the district courts are appealable under 28 U.S.C. §1291. *See* 129 S. Ct. at 1900. The question presented in *Arthur Andersen* was whether this exception applied to "denials of stays requested by litigants who were not parties to the relevant arbitration agreement." *Id.* at 1899. The Court held that it did, criticizing contrary appellate precedent for "conflating the jurisdictional question with the merits of the appeal." *Id.* at 1900. It cautioned that "[j]urisdiction over the appeal . . . 'must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order.'" *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996)).

Arthur Andersen did not involve a remand order. The Court had no occasion to, and did not, consider whether §16(a)(1)(A) (or §16(a)(1)(C), on which petitioners rely) affects the application of §1447(d) to a remand in a case that involves an alleged arbitration agreement. The Fifth Circuit's order therefore does not conflict with *Arthur Andersen*.

Arthur Andersen's reasoning is also fully consistent with (indeed, positively supports) the court of appeals' conclusion that §1447(d) bars appellate review here. In this case, the "category of order appealed from," 129 S. Ct. at 1900, is a remand for lack of sub-

ject matter jurisdiction. That kind of order may not be appealed under §1447(d). Petitioners did not appeal an order denying their motion to compel because the district court did not issue one. On the contrary, their own notice of appeal referred only to the district court's order "remanding this action." *See* p. 5, *supra*.

Petitioners repeatedly assert that the district court *did* deny their motion to compel, relying on a statement in the Fifth Circuit's *Dahiya* decision that "[a]ny order remanding for lack of subject matter jurisdiction necessarily denies all other pending motions." 371 F.3d at 210; *see* Pet. 11, 12, 14, 19, 24. It is true that if the district court lacked subject matter jurisdiction it could not compel arbitration. That is all that the Fifth Circuit said in *Dahiya*. *See* 371 F.3d at 210 ("[U]nless a federal court possesses subject matter jurisdiction over a dispute, any order it makes (other than an order of dismissal or remand) is void.") (internal quotation marks and alterations omitted). That truism does not make a remand order anything but a remand order and does not make such an order reviewable under §1447(d).[2]

2. The order below does not conflict with Osborn.

Recognizing (as they must) that *Arthur Andersen* did not involve a remand or §1447(d), petitioners also

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[2] Both *Kircher* and *Powerex* rejected arguments that §1447(d) permits review of a merits-related determination that "cannot be disaggregated" from a remand order. *Kircher*, 547 U.S. at 645-46 n.13; *see Powerex*, 551 U.S. at 235-36 (following *Kircher*). In doing so, both cases also distinguished *City of Waco*, 293 U.S. 140, on which petitioners relied before the court of appeals but do not rely in their petition. *See Powerex*, 551 U.S. at 236 ("As we reiterated in *Kircher*, *Waco* does not permit an appeal when there is no *order* separate from the unreviewable remand order.") (citation omitted); *see also* p. 6, *supra*.

assert that the court of appeals' order conflicts with *Osborn*. *See* Pet. 14-19. That claim also fails.

Osborn involved 28 U.S.C. §2679(d), the provision of the Federal Tort Claims Act ("FTCA") that authorizes the Attorney General to remove to federal court a suit raising a tort claim against a federal employee after certifying that the employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. §2679(d)(1). Such a "certification . . . conclusively establish[es] scope of office or employment for purposes of removal." *Id.* §2679(d)(2).

In *Osborn*, this Court considered the interaction between §1447(d) and §2679(d)(2). It determined that §2679(d)(2) was an "antishuttling provision[]" by which "Congress ha[d] barred a district court from passing the case back to the state court where it originated" and that because of that categorical bar appellate review of a remand was appropriate despite §1447(d). 549 U.S. at 243-44. The Court cautioned, however, that its

> decision that §2679(d)(2) leaves the district court without authority to send a certified case back to the state court scarcely means that whenever the district court misconstrues a jurisdictional statute, appellate review of the remand is in order. Such an exception would, of course, collide head on with §1447(d), and with our precedent. Only in the extraordinary case in which Congress has ordered the inter-court shuttle to travel just one way – from state to federal court – does today's decision hold sway.

Id. (citation omitted).

Nothing in 9 U.S.C. §205, the removal statute that petitioners have invoked, makes this a similarly "extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way." *Id.* On the contrary, §205 itself directs (with an exception not relevant here) that "[t]he procedure for removal of causes otherwise provided by law shall apply" to cases removed under that section. Accordingly, *Osborn*'s narrow holding based on the language of a different statutory provision does not conflict with the Fifth Circuit's order.

3. Powerex *is fatal to petitioners' argument.*

This Court confirmed the narrowness of *Osborn*'s holding in *Powerex*, which was issued a few months after *Osborn*. Petitioners cite *Powerex* only in a footnote and quote only the dissent. *See* Pet. 17 n.6. The majority opinion, however, conclusively defeats petitioners' claim of a conflict with *Osborn*.

Powerex involved a removal by an entity that claimed "foreign state" status under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§1441(d), 1603. The district court had held that Powerex, a subsidiary of a state-owned hydropower company, was not a foreign state; and, concluding that this deprived it of subject matter jurisdiction, had remanded the case to state court. *See* 551 U.S. at 227-28, 232-33. Powerex sought appellate review and argued (like petitioners here) that the importance of FSIA immunity to foreign relations was such that "Congress could not have intended to grant district judges irrevocable authority to decide questions with such sensitive foreign-relations implications." *Id.* at 236 (internal quotation marks omitted).

The *Powerex* Court firmly rejected that argument. Describing §1447(d) as a "clear jurisdictional stat-

ute," the Court reasoned that an equally clear exception to §1447(d) would be required to make a particular class of remand orders reviewable on appeal. *Id.* at 237. The Court therefore reaffirmed "longstanding precedent" that a "'clear statutory command'" is required when Congress seeks to depart in a particular context from the "'"universal[] . . . practice" of denying appellate review of remand orders.'" *Id.* (quoting *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995), in turn quoting *United States v. Rice*, 327 U.S. 742, 752 (1946)).

The *Powerex* Court discussed *Osborn* in two long footnotes. One explained that *Osborn* "had nothing to say about the scope of review that is permissible under §1447(d), since it held that §1447(d) was displaced in its entirety by 28 U.S.C. §2679(d)(2)." *Id.* at 233 n.2. The other, responding to an argument made in the dissent, explained that the key to *Osborn*'s holding was its "repeated[] emphas[is] that [§2679(d)] certification is '"conclusiv[e] . . . *for purposes of removal*."'" *Id.* at 238 n.5 (quoting *Osborn*, 549 U.S. at 242, 243, in turn quoting 28 U.S.C. §2679(d); fourth alteration, omission, and emphasis added in *Powerex*). *Powerex* therefore rejected a reading of *Osborn* that would "license . . . courts to assume the legislative role" by making exceptions to "§1447(d)'s bar on appellate review" without a textual mandate. *Id.* Notably, Justice Ginsburg, who wrote *Osborn*, joined *Powerex* in full.

Petitioners' studied avoidance of *Powerex* is telling: *Osborn* on its face fails to support their claim of a conflict with the court of appeals' order, but the gloss given to *Osborn* by *Powerex* disposes of that claim completely. Petitioners cannot credibly contend that the removal provision at issue here "displace[s]

[§1447(d)] in its entirety," *id.* at 233 n.2, in light of its express incorporation of "[t]he procedure for removal of causes otherwise provided by law," 9 U.S.C. §205. Their attempt to establish a conflict between the Fifth Circuit's order and a decision of this Court therefore fails.

B. The Fifth Circuit's Order Does Not Conflict with the Decisions of Other Circuits

1. There is no conflict with the Ninth Circuit's Reddam *decision.*

Petitioners claim that the order below conflicts with the Ninth Circuit's decision in *Reddam*. *Reddam* is distinguishable and inconsistent with this Court's intervening precedent. In any event, it does not provide a basis on which to grant certiorari.

In *Reddam*, the Ninth Circuit reviewed a district court's decision to remand a case removed under §205 after the chosen arbitrator (the National Association of Securities Dealers) declined to arbitrate. *See* 457 F.3d at 1057. The *Reddam* court held that, "[w]here [a] remand order is not based on defective removal or lack of subject matter jurisdiction *at the time of removal*, §1447(c) does not apply and the §1447(d) restriction [on appellate review] does not apply either." *Id.* at 1058 (emphasis added, footnote omitted). It relied on a line of cases holding that events occurring after the time of removal "cannot be the basis for a §1447(c) remand order." *Id.* at 1059.

The district court's remand order in this case did not rely on events occurring after the time of removal. Instead, the court relied exclusively on the contents of insurance policies signed years before removal. *See* Pet. App. 31a-37a. *Reddam* thus does not suggest that the Ninth Circuit would have reached a different result on the present facts.

In addition, *Powerex* considered and rejected the proposition that "a remand for lack of subject-matter jurisdiction is not covered [by §1447(c)] so long as the case was properly removed in the first instance," "hold[ing]" instead that, "when a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by §1447(c) and thus shielded from review by §1447(d)." 551 U.S. at 230, 232. That holding is contrary to *Reddam*. *See Price v. J & H Marsh & McLennan, Inc.*, 493 F.3d 55, 60-61 (2d Cir. 2007) (listing *Reddam* among cases applying the so-called "post-removal-event" doctrine that was rejected by this Court in *Powerex*). It is likely that, if and when the Ninth Circuit again has occasion to consider *Reddam*, it will revisit that case without further guidance from this Court.[3]

Petitioners rely upon a footnote in *Reddam* that reads, in its entirety: "Beyond that, we have jurisdiction under 9 U.S.C. §16(a)(1)(A) & (B) to review the district court's conclusion that it could no longer enforce the arbitration agreement." 457 F.3d at 1059 n.8. That conclusory footnote is more dictum than holding and does not even cite §1447(d). It does not establish that the Ninth Circuit has adopted a rule that §16(a)(1) displaces §1447(d) in cases that do not involve a district court's reliance on post-removal events. When the Ninth Circuit ultimately reconsiders *Reddam* in light of *Powerex*, it likely will not

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[3] Since *Powerex*, the Ninth Circuit has applied *Reddam* once in an unpublished memorandum affirmance that did not involve an arbitration agreement. *See Ultimate Creations, Inc. v. McMahon*, 300 F. App'x 528, 529 (9th Cir. 2008). *Ultimate Creations* is nonprecedential and does not suggest that the Ninth Circuit will not follow *Powerex* when better advised.

interpret *Reddam*'s footnote as an exception to §1447(d), or it will reconsider that footnote along with the rest of *Reddam*'s holding. It would be premature for this Court to grant review before seeing whether the Ninth Circuit will appropriately apply *Powerex*'s emphasis on the need for a "clear statutory command" to bypass §1447(d). 551 U.S. at 237 (internal quotation marks omitted).

2. Petitioners cite other cases that are irrelevant.

The remaining cases that petitioners allege conflict with the Fifth Circuit's order below have nothing to do with the question presented. None involved review of a remand to state court, and thus none interpreted or applied §1447(d).[4]

In *Sarhank Group*, *cited in* Pet. 20-21, the Second Circuit reviewed a district court's grant of a petition to enforce an award by an Egyptian arbitration tribunal. *See* 404 F.3d at 658-59. The district court had found that it had subject matter jurisdiction, and the Second Circuit agreed. *See id.* at 659-60. There was no remand, and the Second Circuit never cited §1447(d).

In *Sandvik AB*, *cited in* Pet. 21, the Third Circuit reviewed a district court's order denying a motion to compel arbitration. *See* 220 F.3d at 102. In denying

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[4] *See* Pet. i (presenting the question whether "an order denying a motion to compel arbitration and remanding to state court is appealable under the Federal Arbitration Act's express right of interlocutory appeal from such denials, 9 U.S.C. §16(a)(1)(C), notwithstanding 28 U.S.C. §1447(d)"). Respondents do not concede that this case actually involves "an order denying a motion to compel arbitration," because the district court entered no such order. *See* p. 5, *supra*. Even as petitioners have formulated the question, however, cases that do not involve an order "remanding to state court" are not within its scope.

that motion, the district court had retained jurisdiction to conduct further proceedings in order to "determin[e] . . . whether there was an actual agreement to arbitrate." *Id.* The Third Circuit held that §16(a)(1)(C) gave it jurisdiction to review the district court's interlocutory denial of the motion to compel. *See id.* at 102-04. There was no remand, and the Third Circuit never cited §1447(d).[5]

The same is not true, however, of the Fourth and Eighth Circuit cases that petitioners concede support the Fifth Circuit's decision in this case. *See* Pet. 20 (citing *Severonickel v. Gaston Reymenants*, 115 F.3d 265, 267 (4th Cir. 1997), and *Transit Casualty Co. v. Certain Underwiters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997)). Those cases *did* involve district court remand orders based on a lack of subject matter jurisdiction under 9 U.S.C. §205 and *did* hold that appellate review was barred by §1447(d). *See Severonickel*, 115 F.3d at 266-69; *Transit Cas.*, 119 F.3d at 623-25.

The Second, Seventh, and Eleventh Circuits have reached similar results in cases removed under §205 but remanded based on procedural defects. *See La-Farge Coppee v. Venezolana De Cementos, S.A.C.A.*, 31 F.3d 70, 72 (2d Cir. 1994) ("[T]he remand was ordered on grounds covered by subsection 1447(c), and appellate jurisdiction is therefore unavailable under subsection 1447(d)."); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir. 1992) (holding that §205 "incorporates" §1447(d)'s bar on appellate

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[5] Petitioners also cite in a footnote *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), and *McLaughlin Gormley King Co. v. Terminix International Co.*, 105 F.3d 1192 (8th Cir. 1997). As with *Sarhank* and *Sandvik AB*, neither of those cases involved a remand to state court.

review); *In re Ocean Marine Mut. Protection & Indem. Ass'n, Ltd.*, 3 F.3d 353, 355 (11th Cir. 1993) ("[A] remand order based on a timely §1447(c) motion to remand for defects in removal procedure is unreviewable pursuant to §1447(d)."). Although not directly on point, those cases support the Fifth Circuit's conclusion that §1447(d) does apply in cases removed under §205.

In sum, with regard to the question presented for this Court's review – whether, in a case removed under §205, §1447(d) bars appellate review of a district court's remand order that is based on a lack of subject matter jurisdiction – there is consensus, not conflict, among the courts of appeals.

II. THE DECISIONS BELOW ARE CORRECT AND DO NOT WARRANT REVIEW

A. The Fifth Circuit Correctly Concluded that It Lacked Jurisdiction

The court of appeals rightly determined that it lacked jurisdiction over petitioners' appeal. Section 1447(d) directs that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with the exception of certain civil rights cases. This broad bar on review has been narrowed by judicial interpretation, *see Thermtron Prods.*, 423 U.S. at 345-46, but nevertheless still applies to remands based on lack of subject matter jurisdiction. It is well-established that, where §1447(d) applies, "'review is unavailable no matter how plain the legal error in ordering the remand.'" *Kircher*, 547 U.S. at 642 (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14 n.13 (1977)).

The district court's opinion shows (and petitioners do not appear to dispute) that the court *characterized* its order as a remand for lack of subject matter juris-

diction. *See* Pet. App. 36a-37a.[6] Under *Powerex*, appellate "review of [a d]istrict [c]ourt's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable." 551 U.S. at 234. The question whether the district court *correctly* determined that it lacked subject matter jurisdiction was not before the Fifth Circuit and would not be before this Court even if certiorari was granted. In any event, the district court's conclusion was more than merely colorable. *See* pp. 21-23, *infra*.

The court of appeals' reasoning in reaching these conclusions is well set forth in its earlier *Dahiya* and *Warrantech* decisions, in terms that apply equally to this case.[7] Those decisions also correctly concluded that the applicability of §1447(d)'s bar on appellate review is reinforced in cases removed under 9 U.S.C. §205 by Congress's instruction that "[t]he procedure for removal of causes otherwise provided by law shall

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[6] Two sitting Justices have taken the position that a "conclusion that the District Court purported to remand for lack of subject-matter jurisdiction is alone enough to bar review under §1447(d)." *Powerex*, 551 U.S. at 233 (citing *Osborn*, 549 U.S. at 264 (Scalia, J., joined by Thomas, J., dissenting)). That view would make it even clearer that the Fifth Circuit lacked jurisdiction here.

[7] *See Dahiya*, 371 F.3d at 209 ("The district court appears to have concluded that it lacked subject matter jurisdiction and to have remanded on that basis. Thus, under §1447(d), we cannot review the remand."); *Warrantech*, 461 F.3d at 573 ("Section 1447(d) precludes examination of the *merits* of the district court's actions; we only must determine what the district court *perceived* it was doing, as no matter how erroneous, a remand order based on a §1447(c) ground precludes review on appeal.") (footnote and internal quotation marks omitted).

apply." *See Dahiya*, 371 F.3d at 209; *Warrantech*, 461 F.3d at 576; *accord Transit Cas.*, 119 F.3d at 625 (likewise relying on this language); *Amoco Petroleum*, 964 F.2d at 712 (same).[8]

Petitioners object that, if the district court had denied their motion to compel but not immediately remanded, its denial would have been appealable under 9 U.S.C. §16(a)(1)(C) and that "there is no logical or jurisprudential rationale for allowing appeals of such [denials] whenever they precede remand orders, but denying appeals of the same rulings when the District Court elects to issue a simultaneous remand." Pet. 24.[9] On the contrary, there is the best possible reason for treating the two kinds of orders differently: Congress has authorized (via §16(a)(1)(C)) an appeal from the denial of a motion to compel, but has prohibited (via §1447(d)) an appeal from the grant of a motion to remand.

Congress itself also had an excellent reason for the prohibition of §1447(d): that section embodies a longstanding "policy . . . oppos[ing] 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Kircher*, 547 U.S. at 640 (quoting *Rice*, 327 U.S. at 751); *see also Powerex*, 551 U.S. at 238-39. The policy

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[8] Petitioners assert in a footnote that this language from 9 U.S.C. §205 refers only to 28 U.S.C. §1446, and not to §1447. On the contrary, the phrase "procedure for removal of causes otherwise provided by law" easily encompasses §1447(d), as every court to consider the question has concluded.

[9] Petitioners are also wrong that this case involves the "same ruling[]" that would be appealable under §16(a)(1)(C). The district court never denied petitioners' motion to compel. *See* p. 5, *supra*.

question before Congress when it enacted §205 was not whether arbitration agreements are important, *see* Pet. 24-31, but whether those agreements are important *enough* to justify an exception to §1447(d)'s general prohibition against review of remands. If Congress had thought they were, it would have said so. *See Powerex*, 551 U.S. at 237 ("Congress has repeatedly demonstrated its readiness to exempt particular classes of remand orders from §1447(d) when it wishes.").

Petitioners' arguments that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is itself so important that appellate review should be available to enforce "the treaty obligation of the United States," Pet. 24, is very similar to the arguments rejected in *Powerex*. As two Justices observed in that case, Congress "no doubt considered [the FSIA] . . . to be of importance for maintaining a proper relationship with other nations," and there was some reason to believe that denying appellate review of determinations under the FSIA "might well frustrate a policy of importance to [the federal] Government." 551 U.S. at 239 (Kennedy, J., concurring). Those weighty policy considerations, however, could not overcome "the structure and wording of §1447(d)." *Id.* The structure and wording of §1447(d) remain unchanged, notwithstanding *Powerex*, as does the absence of any exception to §1447(d). The policy considerations that favor enforcing arbitration agreements are no weightier (and no less committed to Congress) than those that urge respect for foreign sovereigns. *Powerex* thus forecloses petitioners' arguments and supports the Fifth Circuit's conclusion that it lacked jurisdiction.

B. The District Court Correctly Concluded that It Lacked Jurisdiction

Petitioners fall short of showing even that the district court *erred* in its jurisdictional determination, much less showing that it lacked a colorable basis for that determination. Section 203 provides federal subject matter jurisdiction only over an "action or proceeding falling under the Convention," 9 U.S.C. §203, and only an "arbitration agreement or arbitral award" can "fall[] under the Convention," *id.* §202. Similarly, §205 authorizes removal only of an "action . . . [that] relates to an arbitration agreement or award falling under the Convention." Accordingly, when the district court had determined as a matter of state contract law that the parties had not reached any mandatory arbitration agreement at all,[10] it lacked jurisdiction to go further under the plain language of the statute.

The district court also correctly concluded that, after construing the contract, it could revisit its preliminary ruling that it had jurisdiction – as, indeed,

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[10] That determination was itself correct under the language of the parties' agreement and under applicable principles of state law. *See* Pet. App. 31a-37a. It is also a plainly insufficient ground for review by this Court, and petitioners do not seek review of that question. Further, although petitioners suggest in passing that the district court erred by applying state rather than federal law to determine whether the parties had agreed to arbitrate their dispute, *see* Pet. 28-29, they do not seek review of that question either. The district court was in any event correct. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (explaining with exceptions not relevant here that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts").

it had earlier signaled. *See* Pet. App. 17a, 19a, 27a. Section 1447(c) expressly permits a remand for lack of subject matter jurisdiction "at any time before final judgment." That is consistent with the rule that a lack of subject matter jurisdiction in the district court may be raised "at any time in the same civil action, even initially at the highest appellate instance." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). It is also consistent with the rule that "every order short of a final decree is subject to reopening at the discretion of the district judge." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983). There is no sign that Congress intended to depart from these settled procedural principles in enacting §205.

Petitioners argue that, in enacting §205, "Congress intended for the district courts to make a quick and conclusive assessment of their jurisdiction on the pleadings alone" and that "a district court's determination that a case relates to an arbitration agreement under Section 205 is conclusive of the jurisdictional inquiry." Pet. 16, 17. Although petitioners describe this purported congressional intent with great vigor, they identify no textual basis for that theory and no persuasive inference drawn from any other tool of statutory construction. They simply assert that Congress meant a district court's first look at jurisdiction to be conclusive as though that were enough to make it so. This Court's refusal in *Powerex* to "ignore a clear jurisdictional statute in reliance upon supposition of what Congress *really* wanted," 551 U.S. at 237, applies with equal force to petitioners' arguments here.

Petitioners further argue that Congress showed its intent to provide for "easy removal" in §205 cases by

describing the required relationship between an arbitration agreement and a case to be removed using the broad phrase "relates to." Pet. 16 (internal quotation marks omitted). However broad the phrase "relates to" may be, it does not establish or imply that Congress meant a district court's first determination about whether a case relates to an arbitration agreement to bind that court for the rest of the case. Further, on the facts of this case, the breadth of the phrase "relates to" is irrelevant. The key question before the district court was whether the parties had agreed to arbitrate by incorporating a mandatory arbitration clause into their contract. When it concluded they had not, there was no agreement falling under the Convention in the case and no basis for jurisdiction under either §203 or §205.

In sum, the district court's conclusion that it lacked subject matter jurisdiction was correct, and petitioners have offered no persuasive reason to doubt it. They have certainly fallen short of showing that it lacked a colorable basis. For that latter reason, this case would be a poor vehicle for examining the construction of §205. If after granting review the Court determined (as it likely would) that the district court's ruling was colorably characterized as a remand for lack of subject matter jurisdiction, it would have no occasion to interpret §205 itself.

III. THERE IS NO JUSTIFICATION FOR A GRANT, VACATE, AND REMAND ORDER IN THIS CASE

Petitioners seek the alternative relief of an order granting certiorari, vacating the order of the court of appeals, and remanding to "require the Fifth Circuit to explain its actions." Pet. 33. There is no reason for such an order in this case.

In *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam), this Court set forth the standard to be applied when considering whether to grant certiorari and then summarily vacate and remand ("GVR"):

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Id. at 167. Petitioners allege no intervening developments that meet that standard and do not claim that it is met. Nor could they. *Osborn* was decided in 2007, and *Arthur Andersen* in May 2009, well in advance of the Fifth Circuit's order and of petitioners' briefing to that court.

Petitioners fault the Fifth Circuit for not explaining its reasoning when it dismissed their appeal. That summary disposition, however, is easily explained. In opposing respondents' motion to dismiss for lack of appellate jurisdiction, petitioners did not cite *Osborn*, did not cite *Arthur Andersen*, and did not urge the court of appeals to reconsider either *Dahiya* or *Warrantech* as conflicting with any decision of this Court. *See* pp. 5-6, *supra*. Instead, they claimed implausibly that both *Dahiya* and *Warrantech* could be distinguished on their facts. *See id.* at 6. Faced with that argument, the court of appeals no doubt reasonably concluded that an opinion merely applying *Dahiya* and *Warrantech* would have no precedential signific-

ance and that it was unnecessary to write one. The "equities of the case," *Lawrence*, 516 U.S. at 167-68, do not favor this Court's intervention to permit petitioners to reargue this case before the court of appeals with new arguments and authorities not presented during its first stop in that court.

The cases that petitioners cite in which this Court has issued GVR orders to require a lower court to clarify the basis for its reasoning, *see* Pet. 32-33, were rare exceptions to the general principles set forth by *Lawrence*.[11] Nothing about this case should prompt this Court to exercise its discretion similarly here. Petitioners have failed to establish that this case involves any issue that warrants this Court's review and indeed have failed even to cast doubt on the correctness of the Fifth Circuit's order.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[11] *See Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (per curiam) (vacating and remanding for further consideration of a *Brady* claim that had been "clearly presented" to the state supreme court and that raised a "significan[t] . . . issue" about the validity of a criminal conviction for a serious offense); *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) (in a voting rights case, vacating and remanding for an explanation of a court of appeals' decision "summarily revers[ing] without any opinion on a point that had been considered at length by the District Judge"). *Northcross v. Board of Education*, 412 U.S. 427 (1973) (per curiam), the third case cited by petitioners, clarified the statutory standard to be applied on remand to a request for attorneys' fees before vacating the order of the court of appeals and is therefore more accurately described as a summary merits disposition than a GVR as the Court now uses the term. *See id.* at 428-29 (construing 20 U.S.C. §1617 (1972) (repealed 1978)).

Respectfully submitted,

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IN THE

Supreme Court of the United States

ZURICH AMERICAN INSURANCE CO., *et al.*,
Petitioners,

v.

PIONEER NATURAL RESOURCES USA, INC. AND PIONEER NATURAL RESOURCES COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents' ("Pioneer's") position only underscores the importance of the question presented and the conflict between the decision below and the precedents of this Court and other circuits. In 9 U.S.C. § 16(a)(1)(C), Congress provided an express right to appeal any decision denying arbitration in a case removed under the Convention, to ensure federal appellate vindication of the strong federal policy favoring arbitration. Yet in the view of Pioneer and the Fifth Circuit, any district court can permanently deny federal jurisdiction to a party seeking to vindicate its right to arbitrate under the Convention—including the express right to federal appellate review—by simply remanding a case at the

same time, rather than after, the court rejects a motion to compel arbitration.

This is not what the signatories to the Convention had in mind, nor is it what Congress intended when it codified the Convention and enacted a specific statutory right to interlocutory appeals from denials of arbitration. It is also not what the precedents of this Court and other circuits provide. The Court's review is therefore warranted to resolve these conflicts and to vindicate the provisions of the Convention and Federal Arbitration Act favoring arbitration. And at a bare minimum, the Court should not allow the Fifth Circuit to vitiate Congress's policies without stating the reasons for a dispositive jurisdictional ruling made for the first time on appeal.

I. THE ISSUE IS IMPORTANT.

1. Pioneer does not dispute that the issue is important. Instead, it surmises—without support—that Congress made a policy judgment that vindicating arbitration agreements is not "important *enough* to justify an exception to [28 U.S.C.] § 1447(d)'s general prohibition against review of remands." Opp. 20 (emphasis in original). Pioneer suggests that if Congress wanted to permit review of the District Court's decision against arbitration in this case, it would have done so by an express exception from Section 1447(d). *Id.* Congress unequivocally showed, however, that agreements under the Convention *are* important enough to mandate federal appellate review by enacting a specially-designed removal provision that makes an initial determination of federal jurisdiction conclusive whenever a case "relates to" a covered agreement, and a statutory right to interlocutory appeal of all denials of arbitration under the

Convention. No specific exception from Section 1447(d) was needed, because a comprehensive statutory scheme provides for both federal court and appellate jurisdiction here.

Pioneer's assertion that there is "no sign" that Congress intended to depart from "settled procedural principles" regarding remands, Opp. 22, ignores the plain language and design of the Convention's special removal provision, 9 U.S.C. § 205. Unlike normal removal statutes, Section 205 has special provisions favoring removal that lengthen the time for removal (until trial, rather than 30 days), permit removal based on allegations in the removal petition (rather than just the complaint), and, above all, expand jurisdiction over actions that merely "relate[] to" agreements falling under the Convention, making it "one of the broadest removal provisions * * * in the statute books." *Acosta* v. *Master Maint. & Constr., Inc.*, 452 F.3d 373, 377 (5th Cir. 2006).

In arguing for application of Section 1447(d), Pioneer makes much of Section 205's provision that "[t]he procedure for removal of causes otherwise provided by law shall apply," but this plain language incorporates only procedures for *removal* (such as what to file, etc.), not procedures and standards for a *remand* order, or its appealability. Consistent with Congress's intent to make the determination of federal jurisdiction conclusive under the Convention, Section 205 includes no provision for remand at all. And the express language of Section 16(a)(1)(C) creates a right to appeal any "order * * * denying an application under section 206 of this title to compel arbitration," ensuring, as this Court held in *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896 (2009), that a denial of arbitration may receive federal

appellate review regardless of subsequent consideration of the merits by the district court or court of appeals.

This specific question for which Congress mandated appellate review is different from the general question governed by Section 1447(d). Unlike Section 1447(d), the Convention addresses the question of *whether* a dispute will be resolved by arbitration or litigation, not merely *where* it will be litigated. *See* Pet. 18-19. Because federal policy and the Convention, unlike many state laws, strongly favor arbitration, Congress ensured interlocutory federal appellate review of any decision *denying* that right, while expressly prohibiting such review of decisions *granting* arbitration. *Compare* 9 U.S.C. § 16(a) *with* 9 U.S.C. § 16(b).

Pioneer's position and the Fifth Circuit's decision eviscerate those express statutory provisions. Congress stated that if a court rejects a contention that a dispute is arbitrable—for whatever reason—thereby requiring the parties to litigate, an interlocutory right of appeal exists. The most common reason to deny arbitration is because the court finds a lack of an agreement to arbitrate. Thus, under the decision below, a district court could circumvent Section 16(a) in almost every instance where it would otherwise apply to a removed case, merely by denying arbitration at the same time as, rather than before, remanding to state court.

2. Pioneer nevertheless asserts that Section 16(a)(1)(C) cannot apply here because the District Court did not really deny a motion to compel arbitration. *See, e.g.*, Opp. 9. The Fifth Circuit made no such holding, and Pioneer's attempt to avoid the issues fails in any event. When the District Court

issued the order under review, it had before it the Underwriters' motion to compel arbitration and Pioneer's motion to remand some—but not all—claims. *See* Pet. App. 24a ("This matter is before the court on a motion by defendants * * * to compel arbitration * * *."); *id.* at 36a ("The Underwriters' motion to compel arbitration * * * requires the court *in this ruling* to engage in contract interpretation.") (emphasis added); Pet. 10 (motion to remand related only to some claims). The order then expressly denied the Underwriters the right to arbitrate, on the ground "that no valid agreement exists between the parties to submit the disputes to arbitration." Pet. App. 36a.

This order was unquestionably an order "denying an application * * * to compel arbitration" that is expressly appealable under Section 16(a)(1)(C). *See* H.R. Rep. No. 100-889, at 36-37 (1988) ("interlocutory appeals are provided for when a trial court rejects a contention that a dispute is arbitrable under an agreement of the parties and instead requires the parties to litigate"). The Fifth Circuit has so held in materially indistinguishable circumstances. *See Dahiya* v. *Talmidge Int'l, Ltd.*, 371 F.3d 207, 210 (5th Cir. 2004) ("[a]ny order remanding for lack of subject matter jurisdiction necessarily *denies* all other pending motions") (emphasis added).

Pioneer's argument underscores the absurdity of its ultimate position. It is undisputed that if the District Court had denied the motion to compel arbitration even just a moment before it remanded the case, that denial would be expressly appealable under Section 16(a). *See* Pet. 24. Pioneer offers no reason, and there is none, why a district court should be able to manipulate that express grant of appellate

jurisdiction by expressly holding, in ruling on a motion to compel arbitration, "that no valid agreement exists between the parties to submit the disputes to arbitration," Pet. App. 36a, and then remanding the case at the same time.

According to Pioneer, the court's ruling on the critical question of arbitration is rendered unreviewable by this legerdemain "'no matter how plain the legal error.'" Opp. 17 (citation omitted). But that is the exact opposite of Congress's intent when it enacted Section 16(a)(1)(C) to implement an international treaty. Whereas Congress bestowed immediate federal appellate review over any decision rejecting arbitration under the Convention in order to ensure a uniform body of federal law, the Fifth Circuit's decision instead relegates the critical issue of arbitration to the *ad hoc*, unreviewable judgments of hundreds of district court judges.

As one judge has noted in a similar case:

> The net result of [the Fifth Circuit's] errors is to frustrate the intention of Congress * * * to give foreign parties the right to choose arbitration as a form of dispute resolution designed to save the parties time, money, and effort by substituting for the litigation process the advantages of speed, simplicity, and economy associated with arbitration. If the provisions of § 1447(d) will always trump the provisions of 9 U.S.C. § 16, then the Convention will be unenforceable in the State of Louisiana * * *.

Dahiya v. *Talmidge Int'l Ltd.*, 380 F.3d 218, 219 (5th Cir. 2004) (DeMoss, J., dissenting from denial of rehearing en banc); *see also Dahiya*, 371 F.3d at 214 n.3 (issue "cries out for immediate remedy from the Supreme Court") (DeMoss, J., dissenting).

Where, as here, the pleadings show that claims "relate[] to" an agreement falling under the Convention, federal jurisdiction has been conclusively established and any decision rejecting arbitration is expressly appealable under Section 16(a)(1)(C), notwithstanding Section 1447(d).[1]

II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER CIRCUITS.

1. This Court should not allow the conflicts with the precedents of this Court and other circuits to persist. Pioneer claims that *Arthur Andersen* does not conflict with the decision below because that case did not involve a remand. Opp. 8. Pioneer further (and implausibly) asserts that *Arthur Andersen*'s reasoning is "fully consistent" with the Fifth Circuit's decision to deny all appellate review here, because it believes that the "category of order appealed from," 129 S. Ct. at 1900, is only a remand for lack of

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[1] Contrary to Pioneer's implications, *cf.* Opp. 19-20, the District Court never reversed its initial holding that Pioneer's claims "relate to" an arbitration agreement falling under the Convention—the AEGIS policy—under the broad removal standards of Section 205. *See* Pet. App. 17a, 22a; *Beiser* v. *Weyler*, 284 F.3d 665 (5th Cir. 2002). Rather, the court later held (erroneously, in the Underwriters' view) only that the Underwriters and Pioneer had not themselves agreed to the arbitration terms of the AEGIS policy. Regardless of the court's erroneous state-law construction that the "following form" provision did not incorporate the mandatory arbitration provisions of the AEGIS policy, this dispute continues to "relate to" that agreement. Indeed, it is undisputed that the AEGIS policy is effective, and that the parties are currently arbitrating, under that policy, many of the same coverage disputes as are at issue in this case. *See* Pet. 7; Pet. App. 7a. Thus, "relates to" jurisdiction never disappeared, even if the District Court found reasons not to compel arbitration.

subject matter jurisdiction, not an order denying a motion to compel arbitration. Opp. 9.

Pioneer's single-minded focus on the District Court's purported characterization of its order leads it to ignore *Arthur Andersen*'s precedential effect. The only "category of order appealed from" under Section 16(a)(1) is the District Court's denial of the Underwriters' motion to compel arbitration. A reversal on that question will result in the avoidance of litigation entirely—the specific subject for which Section 16(a) provides a right of appeal—rather than the general subject addressed by Section 1447(d), *i.e.*, whether litigation will proceed in state or federal court. The reasoning of *Arthur Andersen* applies equally to this case.

Osborn v. *Haley*, 549 U.S. 225 (2007), governs this case, not *Powerex Corp.* v. *Reliant Energy Servs.*, 551 U.S. 224 (2007) In *Osborn*, the Court held that for nearly two decades the lower courts had misinterpreted a specialized removal provision not to defeat Section 1447(d). Likewise here, more than two decades after the enactment of Section 16, some circuits persist in permitting Section 1447(d) to defeat federal appeal rights, notwithstanding the far more recent and specific enactment of Section 16. The Court's review is warranted to resolve the conflict between these decisions and this Court's precedents.[2]

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[2] Pioneer faults the Underwriters for not having relied on this Supreme Court authority in the Fifth Circuit. *See* Opp. 24. But there was no need for the Underwriters, in the proceedings below, to have noted the conflict between Fifth Circuit authority and this Court's precedents. The Underwriters had contended that Fifth Circuit precedent, when properly applied, allowed this appeal. *See* Opp. 5. Now that that court has

Just as in *Osborn*, Section 205 and Section 16(a)(1)(C) create an "anti-shuttling" statute that conclusively determines federal jurisdiction. Section 205 expressly permits removal based on whether the action, as described in the pleadings (not the arbitration agreements) "relates to" an agreement under the Convention. Once that determination is properly made on the basis of the pleadings or removal petition, as it was here, federal jurisdiction is conclusively determined and there is no authorization for a subsequent remand. Section 16 completes the design, by ensuring that even if a district court concludes there is no agreement, the party denied the right to arbitration has the right to an interlocutory appeal in federal court. These provisions ensure that jurisdiction is readily determined, and that the subsequent decision about arbitration is decided in federal court, including on appeal if arbitration is denied. As in *Osborn*, this comprehensive scheme has an "anti-shuttling" effect that replaces Section 1447(d).

Powerex, by contrast, has no relevance. Pioneer notes that the Foreign Sovereign Immunities Act ("FSIA"), which was at issue in *Powerex*, like the Convention, has international implications. Opp. 20. But aside from this superficial point, the cases involve sharply distinguishable statutory provisions that demonstrate diverging Congressional intent. The FSIA had no special provision bestowing appellate jurisdiction over the determination at issue. Here, by contrast, the motion to compel arbitration invoked a specific statutory right of appeal, through which Congress specifically intended

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rejected that contention, the conflict has squarely presented itself.

for the courts of appeal to correct erroneous determinations denying arbitration. Unlike in *Powerex*, where the Court held that Congress's intent in the text of Section 1447(d) "prevails over what it ought to have done," 551 U.S. at 238, in this case the Underwriters squarely rely on what Congress actually did in the text of Section 16(a)(1)(C).

2. There is no "consensus" among the circuits. Opp. 17. Pioneer's effort to distinguish *Reddam* v. *KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), fails. That case was remanded under Section 1447(c); thus, it would be unappealable under Fifth Circuit law. But the Ninth Circuit held that it had jurisdiction under Section 16(a). That holding was not dicta; it was an alternative basis for jurisdiction. Nothing *Powerex* says about the "post-removal event" doctrine matters here, because that is not the basis for the court of appeals' jurisdiction in this case. And Pioneer's speculation about if or when the Ninth Circuit might revisit *Reddam* is baseless (or, if anything, concedes its ongoing importance). *Reddam* squarely conflicts with the decision below.

Pioneer's discussion of other cases misses the point. Pioneer does not dispute that another circuit has recognized a conflict among the circuits on precisely the issue raised in this case, or dispute the accuracy of that characterization. *See Restoration Pres. Masonry* v. *Grove Europe*, 325 F.3d 54, 59 (1st Cir. 2003). And the cases cited from other circuits did not involve remand orders only because these courts apply the law in conflicting ways. For example, in *Sarhank Group* v. *Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005), and *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 102 (3d Cir. 2000), the courts held that a determination that a case "relates to" an

arbitration agreement covered by the Convention is not subsequently divested by a later determination that the parties had no valid arbitration agreement. In those circuits, orders such as that at issue here, which reject motions to compel arbitration on the ground that the parties allegedly did not agree to arbitrate, are fully reviewable under Section 16(a)(1)(C) and will not give rise to unreviewable remand orders.

III. ALTERNATIVELY, THE COURT SHOULD REQUIRE THE FIFTH CIRCUIT TO EXPLAIN ITSELF.

Alternatively, the Court should vacate the Fifth Circuit's judgment and remand for the court to explain, if it can, the reasoning for denying the appellate forum mandated by Congress. Pioneer says that the Fifth Circuit's unexplained dismissal is "easily explained" because the court "no doubt" concluded that an opinion applying specific prior cases "would have no precedential significance and that it was unnecessary to write one." Opp. 24-25. But the Fifth Circuit itself said none of this; it said nothing at all. It not only failed to write a single word of opinion, but failed even to cite the authority that Pioneer now surmises was dispositive.

Pioneer does not dispute that this Court has remanded other cases where the lower court failed to explain its reasoning. Pet. 32. Nor does it respond to the contention in the petition that a GVR is particularly warranted here, because the Fifth Circuit was the first court that could opine on the dispositive question of appellate jurisdiction. *See* Pet. 32-33. For this Court to fully discharge its review responsibilities, it must first know exactly what it is reviewing. The Underwriters believe that

the end result ordained by the Fifth Circuit—the refusal to review an issue that Congress decreed is subject to appellate review—itself demonstrates a conflict with precedent. But to the extent the Court is not inclined to grant plenary review on the present record, it should at a bare minimum require the Fifth Circuit to explain itself. It is bad enough that the court refused to review what Congress said it must; it is intolerable that the court did so without even attempting to justify that decision.

CONCLUSION

The petition should be granted and the judgment below reversed. In the alternative, the petition should be granted, the judgment vacated, and the case remanded to the court of appeals for further consideration supported by an opinion.

Respectfully submitted,

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